

INTERNATIONAL LAW AND
THE CHANGING CHARACTER OF WAR

PEDROZO AND WOLLSCHLAEGER

U.S. NAVAL WAR COLLEGE

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Raul A. “Pete” Pedrozo and Daria P. Wollschlaeger
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Foreword

The historic International Law Studies (“Blue Book”) series was initiated by the Naval War College in 1901 to publish essays, treaties and articles that contribute to the broader understanding of international law. This, the eighty-seventh volume of the “Blue Book” series, is a compilation of scholarly papers and remarks derived from the proceedings of a conference hosted at the Naval War College on June 22–24, 2010 entitled “International Law and the Changing Character of War.”

The June 2010 International Law Conference participants examined the international law challenges presented by the changing character of war. The objectives of the conference were to catalogue the extent to which existing international law governs these changing aspects of warfare and to assess whether these developments warrant revision of existing international law. Five panels of presenters addressed topics that spanned the entire spectrum of armed conflict and focused on several emerging legal issues. Specifically, the panelists undertook an examination of the legal issues associated with the use of force in cyberspace, the civilianization of war fighting and the concept of “direct participation in hostilities,” the use of unmanned systems, lawfare in asymmetrical conflicts, and legal issues associated with the investigation and enforcement of violations of the law in asymmetrical conflicts.

Renowned international academics and legal advisers, both military and civilian, representing military, diplomatic, and non-governmental and academic institutions from the global community contributed to the conference and this volume. Readers and researchers will find within this volume a detailed study of the emerging international law challenges to be had as the character of war evolves, as well as their potential impact on the ongoing development of international law, the law of armed conflict and military operations.

The conference and the “Blue Book” were made possible with generous support from the Naval War College Foundation, the University of Texas School of Law and the *Israel Yearbook on Human Rights*. The International Law Department of the Center for Naval Warfare Studies, Naval War College cosponsored the event with the International Institute of Humanitarian Law and the Lieber Society on the Law of Armed Conflict, American Society of International Law.

On behalf of the Secretary of the Navy, the Chief of Naval Operations and the Commandant of the Marine Corps, I extend our thanks and gratitude to all the

participants, contributing authors and editors for their invaluable contributions to this project and to the future understanding of the law of armed conflict.

JAMES P. WISECUP
Rear Admiral, U.S. Navy
President, Naval War College

Introduction

During the last several years we have witnessed impacts on, and changes in, modern warfare, to include cyber operations in Estonia and Georgia, civilianization of the battlefield in Iraq and Afghanistan, use of unmanned systems in Yemen and Pakistan, a lawless enemy invoking “lawfare”—particularly as it relates to civilian deaths and injuries incurred during lawful attacks on enemy targets—to undermine military operations and an enhanced level of public and judicial scrutiny of military actions. Legal practitioners, both military and civilian, and legal academics have worked to identify how international law governs these changing aspects of warfare and to determine if there are any shortfalls requiring changes to the existing legal framework. The legal debate on these matters has been both vexing and fruitful: but a number of unanswered questions remain, making these topics ripe for discourse.

Following its tradition of the in-depth study and teaching of the manner in which the law impacts military operations, the Naval War College hosted a 2010 conference entitled “International Law and the Changing Character of War.” The conference brought together distinguished international law scholars and practitioners to examine the challenge to international law posed by the changing character of war.

Dr. Nicholas Rostow, a former Legal Adviser to the National Security Council, opened the conference by setting the stage for the discussions to follow using as his scene setter the “Study on Targeted Killings” report authored by Professor Philip Alston for the UN Human Rights Council. Although Dr. Rostow, like many others, does not agree entirely with Alston’s conclusions on the applicability of human rights law in armed conflict, and on the lack of transparency and accountability, he noted that this report, like many others, raises questions that pose a challenge to international law. Over the next two and a half days in five thematic panels the speakers presented their analyses of some of those challenges.

As a conference highlight, the attendees were privileged to attend a luncheon address delivered by Professor Robert “Bobby” Chesney, the Charles J. Francis Professor in Law at University of Texas School of Law, who provided an overview of the emerging federal habeas corpus case law involving detainees held at Guantanamo Bay. He highlighted the differing detention standards used by the executive branch and the federal courts’ diverging assessments of the applicability of the law of armed conflict in these cases.

In closing the conference Professor Yoram Dinstein reflected that changes in modern warfare have put legal scholars and practitioners representing nations that abide by the law of armed conflict unnecessarily on the defensive in the face of “modern barbarians” who conduct hostilities in an utterly unlawful fashion. He urged those scholars and practitioners to no longer remain silent, but to go on the legal offensive against those who resort to methods that violate the most basic principles of the law of armed conflict. Professor Dinstein also encouraged resistance to those human rights activists who have erroneously and perilously asserted that during armed conflict human rights law should supplant the law of armed conflict, warning that should they prevail it would be impossible to effectively engage in hostilities.

This edition of the International Law Studies (“Blue Book”) series encapsulates the incredibly thoughtful insights and lessons learned that each presenter brought to the conference, including many gained from personal experience while serving in a variety of conflict zones. The product of their scholarship and roundtable discussions are found within this volume.

The conference was organized by Major Michael D. Carsten, US Marine Corps, of the International Law Department (ILD), with the invaluable assistance of Ms. Jayne Van Petten and other ILD faculty and staff. The conference was made possible through the support of the Naval War College Foundation, the International Institute of Humanitarian Law, the University of Texas School of Law and the *Israel Yearbook on Human Rights*. Without the dedicated efforts and support of these individuals and organizations, the conference would not have been the exceptional success that it was.

I would like to thank Professor Raul A. “Pete” Pedrozo and Colonel Daria P. Wollschlaeger, US Army, for serving as co-editors for this volume, Captain Ralph Thomas, JAGC, US Navy (Ret.), for his meticulous work during the editing process, and the staff of the College’s Desktop Publishing Division, particularly Susan Meyer, Albert Fassbender and Shannon Cole. I also extend thanks to Captain Rymn Parsons, JAGC, US Navy, the Commanding Officer of Navy Reserve, Naval War College (Law), the reserve unit that directly supports the International Law Department. The unit’s willingness to assist with the project and make personnel available to facilitate timely publication of this “Blue Book” was essential. I am grateful to all of the reserve officers, but specifically appreciate the exceptional work of Commander James W. Caley, JAGC, US Navy, for his comprehensive and painstaking work on the index. This publication is the culmination of the tireless effort of each of the previously named individuals, as well as numerous others, and is a tribute to their devotion to the Naval War College and the International Law Studies series.

Special thanks go to Rear Admiral James P. “Phil” Wisecup, the President of the Naval War College, and Professor Robert “Barney” Rubel, Dean of the Center for Naval Warfare Studies, for their leadership and support in the planning and conduct of the conference, and in the publication of this eighty-seventh volume of the “Blue Book” series. This “Blue Book” continues the Naval War College’s long tradition of compiling the highest quality of scholarly inquiry into the most contemporary and challenging legal issues arising from the entire hierarchy of military operations.

The International Law Studies series is published by the Naval War College and distributed worldwide to US and international military organizations, academic institutions and libraries. A catalogue of all previous “Blue Books” appears after the table of contents. Volumes 59–87 of the International Law Studies series are available electronically at <http://www.usnwc.edu/ild>.

DENNIS MANDSAGER
Professor of Law & Chairman
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Preface

From June 22 to 24, 2010 the Naval War College hosted over one hundred and eighty renowned international scholars and practitioners, military and civilian, and students representing government and academic institutions to participate in a conference examining a number of international law issues arising from the changing character of war. The conference featured opening, luncheon and closing addresses, as well as five panel discussions addressing specific legal issues that relate to the changing character of war. Panelist comments were summarized by a commentator, followed by questions from attendees. These discussions resulted in detailed examinations of key issues.

The following conference summary was prepared by Commander James Caley, JAGC, US Navy, a member of the Navy Reserve unit that supports the Naval War College's International Law Department. The summary recapitulates the highlights of each of the conference speakers' presentations. As co-editors, we are deeply indebted to Commander Caley for his attention to detail and assistance in facilitating the publication of this "Blue Book." We would also be remiss if we did not thank Captain Ralph Thomas, JAGC, US Navy (Ret.), for his outstanding support and dedication in editing the submissions for this volume of the International Law Studies series. We also extend our sincere appreciation to Susan Meyer of the Naval War College's Desktop Publishing Division for expertly preparing the page proofs. Additionally, we would like to thank Albert Fassbender and Shannon Cole for their excellent work in proofreading the conference papers. The quality of this volume is a reflection of their professionalism and outstanding expertise.

Opening Address

Dr. Nicholas Rostow, a former Legal Adviser to the National Security Council, delivered the opening address. Focusing on what some refer to as targeted killings and others call extrajudicial executions, Dr. Rostow critically examined the interplay between the law of armed conflict (or international humanitarian law) and the burgeoning body of human rights law. Dr. Rostow's remarks suggested that the interjection of human rights law into armed conflict has created dangerous and divisive ambiguity in, and uncertainty as to, what law should apply and how, the effect of which will be to worsen, not ameliorate, the nature of war.

After first highlighting the agenda and identifying issues dividing the international community, Dr. Rostow critiqued the report, released in May 2010, entitled “Study of Targeted Killings” prepared by United Nations Special Rapporteur Philip Alston. In the report, Alston challenges the legality of targeted killings through the use of drones in Afghanistan and Pakistan. Critical of nations such as the United States, Russia and Israel that authorize drone attacks based on self-defense, Alston questions the credibility of that justification and notes that, even if such action could be justified, targeting of individuals still requires compliance with the law of armed conflict and human rights law.

Dr. Rostow argued that Alston fails to examine individual actions or apply the correct law, furnishes no explanation as to whether his analysis was predicated upon international humanitarian law or human rights law, and fails to articulate what he means by human rights law. Dr. Rostow also questioned Alston’s views that direct participation in hostilities, as defined in Common Article 3 of the 1949 Geneva Conventions and Additional Protocol I, should be narrowly construed, applying only to persons observed to be actively engaged in hostilities. Dr. Rostow urged a broader interpretation, tempering his view with the caveat that “the United States has no interest in catching people in counterterrorism nets that have nothing to do with terrorism.”

Dr. Rostow rejected Alston’s views that the decision to employ force in self-defense should hinge on the availability of “smart” weapons, and that Central Intelligence Agency (CIA) officers who operate drones are unlawful combatants because they do not wear uniforms. In closing, Dr. Rostow exhorted the attendees to seek greater clarity and certainty in the challenging issues to be addressed during the conference.

***Panel I: The Changing Character of the Battlefield:
The Use of Force in Cyberspace***

Panel I tackled the complex legal issues underlying this potent and growing form of warfare. Moderated by Captain Stacy Pedrozo, JAGC, US Navy, of the Naval Justice School faculty, the panel, consisting of Columbia Law School professor Matthew Waxman, Durham University Law School professor Michael Schmitt and Professor Derek Jinks, current Stockton Chairholder at the Naval War College, used recent large-scale cyber attacks in the countries of Estonia and Georgia to illustrate how cyber warfare may be conducted and how difficult it is to combat, especially with regard to the issues of identification and attribution. Other significant issues explored included when does a cyber attack constitute use of force, what avenues of response (kinetic v. non-kinetic) may exist and what is the responsibility of

States for attacks launched by non-State actors from within those States. Professor Jinks raised additional questions as to the appropriate burden of proof for State responsibility, noting that three competing standards (clear and convincing, beyond a reasonable doubt and fully conclusive) have been advanced.

Captain Pedrozo opened the panel with a summary of the April 2007 cyber attacks in Estonia, which resulted in defacement of, and denial of service from, websites belonging to the Estonian Parliament, banks, ministries, schools, newspapers and broadcasters. Several websites were forced to shut down for a few hours or in some instances even longer when these sites, which typically received one thousand visits a day, were flooded with two thousand visits per second. Estonia accused Russia of direct involvement but failed to furnish proof, and no clear picture has ever been produced as to whether this was ever a State-sponsored event. Estonia charged only one person, an ethnic Russian Estonian, who was eventually convicted of attacking the website of the Estonian Reform Party. He was fined approximately \$1,640. Russian authorities refused to help with the investigation.

Professor Waxman commented that cyber attacks are both legally and factually difficult to characterize. Legally speaking, Article 2(4) of the United Nations Charter prohibits any State from using force against another, which, in the view of many, means use of kinetic force and, hence, would not prohibit cyber attacks. In the view of others, coercion alone—either by economic pressure or other mode—is enough to constitute a use of force. The problem is distinguishing lawful from unlawful coercion. Factually, cyber attacks are difficult to identify and attribute, making it hard to assign culpability. This is not a new problem for Article 2(4) analysis as there is much UN case history from the proxy conflicts of the Cold War.

Professor Schmitt observed that there is authority for the proposition that unless there is an armed attack, a State cannot respond in self-defense within the meaning of Article 51 of the UN Charter without authority from the Security Council. In Professor Schmitt's view, however, States have a right to defend themselves before an attack with a response authorized at the last opportunity to prevent an attack. The self-defense right includes the right to respond kinetically to cyber attacks so long as the response is proportional. With respect to non-State actors (e.g., insurgent groups), a proper response to a cyber attack may be to first demand that the host State take action against the non-State actors and, if unproductive, attack only if the right of the host State to defend its sovereignty is weaker than the right of the attacking State to self-defense.

A more difficult issue may be ascertaining the relevant standard of proof for proving cyber attack liability. Clear and compelling evidence is the proposed standard, but may be impossible to reach given current levels of technology, which cannot overcome identity masking. Professor Jinks pointed out that identifying the

cyber perpetrator is essential to any response in self-defense and that identification is very difficult. Perpetrators operate in decentralized networks and can easily mask their identities. Though Article 51 of the UN Charter requires proof of State action in order to respond, there is widespread precedent of States responding to violent attacks from non-State actors under justification of self-defense, to include the *Caroline* case.

If States have a right to respond to non-State actors in the territory of another State, they still must meet a high standard of proof and perhaps the host State must first given the opportunity to deal with the non-State actors. According to Professor Jinks the development of an accountability framework requires (i) establishing a legal standard for State response and (ii) agreement on the appropriate standard of proof. At this juncture, a State may respond if it is able to prove the host State exercises “control,” as is the case when a State employs contractors. An alternative basis may exist under Article 51 if the State acknowledges and adopts the action of the non-State actor, is unable to assist in neutralizing the threat or harbors the responsible group. The most appropriate standard of proof may be clear and convincing evidence, though the International Criminal Tribunal for the former Yugoslavia uses the standard of “beyond a reasonable doubt” and the International Court of Justice employs a standard of fully conclusive evidence. Given the varying existing standards of proof and the difficulty of meeting any one of them in a cyber context, there may be a need to relax both the standard of State responsibility and the standard of proof. To relax the standard of proof is to invite significant collateral costs. The solution is to forge an international consensus on State obligations and the consequences of breaches.

The cyber attacks in Estonia involved civilian targets. Can cyber attacks be directed at civilians? To be sure, violent attacks are prohibited but non-violent cyber attacks do not necessarily run afoul of international humanitarian law. Perhaps the issue should turn on the consequences of the attack, the seriousness of which, in the cyber arena, might justify an armed response. The objective of the attack also raises issues. For example, the cyber attack on the Georgian Ministry of Defence was directed at a military target. The indirect effects on commerce of an attack on a military target may also be deemed to be direct, if they are foreseeable. Finally, those conducting the cyber attack are often civilian contractors. The “direct participation in hostilities” standard should therefore apply.

Luncheon Address

University of Texas School of Law professor Robert Chesney delivered a thought-provoking luncheon address that recounted the results of the thirty-three habeas

corpus proceedings in US federal courts involving detainees held at Guantanamo Bay. Professor Chesney explored the differing detention standards utilized by the Bush and Obama administrations, the 2001 statute authorizing military force against terrorists and the statutes pertaining to military commissions. Professor Chesney also noted the widely diverging conclusions reached by trial and appellate judges regarding the applicability of the law of armed conflict to these cases.

Beginning with the general observation that over the last several years great interest has been taken in US detention operations in Guantanamo Bay but not Iraq or Afghanistan, Professor Chesney suggested that the volume of habeas litigation by Guantanamo detainees is explained by the fact that these detainees are confined outside the reach of the United Nations or other international body, therefore in every practical sense held within the constant jurisdiction of the United States alone.

Of the thirty-three decisions by Article III courts addressing the merits of Guantanamo detainee petitions for habeas corpus, nineteen granted relief, resulting in the release of eleven detainees. Fourteen detainees have lost on the merits, with two of these cases affirmed on appeal. The definition of who may be detained pursuant to the Authorization for Use of Military Force for acts related to international terrorism is still evolving. The current standard authorizes detention of persons who were members of—or substantially supported—Taliban or al-Qaida or associated forces engaged in hostilities against the United States or coalition partners. The definition is informed by law of war principles, yet the DC Circuit Court of Appeals opined that the law of war is irrelevant to this formulation, deciding that domestic law, grounded in the Military Commissions Act, furnishes the relevant statutory background. In Professor Chesney’s view, the varied judicial opinions make this area ripe for further legislative action.

Panel II: The Changing Character of the Participants in War: Civilianization of Warfighting and the Concept of “Direct Participation in Hostilities”

Panel II, which was moderated by Professor Charles Garraway, Associate Fellow of the Royal Institute of International Affairs (Chatham House) in the United Kingdom, wrestled with contentious issues surrounding the concept of direct participation in hostilities (DPH). Panel members Ryan Goodman, a New York University law professor; Brigadier General Blaise Cathcart, Judge Advocate General of the Canadian Forces; Françoise Hampson, an Essex University law professor; and Dr. Nils Melzer, legal advisor to the International Committee of the Red Cross (ICRC), examined the ICRC’s controversial 2009 *Interpretive Guidance on the Notion of Direct Participation in Hostilities* (IG) and the extent to which the IG does or does

not reflect international law. Among the salient issues considered were the contrasting and confusing status- and behavior-based approaches in international humanitarian law and human rights law to determining when civilians are “directly participating in hostilities,” thereby losing protections against direct attack otherwise provided to civilians under law.

Professor Garraway opened the panel by describing the 2009 IG as both uncontroversial and highly controversial. International humanitarian law hinges on the principle of the distinction between combatants and non-combatants. Non-combatants are presumed not to be directly participating in hostilities, and therefore are entitled to protection from attack. In the ICRC’s view, Professor Garraway noted, civilians lose this protection if—but only if, and only for so long as—they directly participate in hostilities.

Professor Goodman disagreed with the ICRC interpretation of international law in Section IX, “Restraints on the Use of Force,” noting that the IG failed to identify specific treaty law and State practice in support of its position. Professor Goodman also noted the law of war already contains restrictions applicable to the killing of an otherwise legitimate target, to include combatants who are *hors de combat*; escaping prisoners of war; and actions taken in reprisal. He noted that such restrictions may seemingly support the ICRC’s position on restraints of the use of force, but not to the extent which the IG suggests.

Professor Hampson discussed the ongoing debate regarding the interrelationship between international humanitarian law and human rights law with respect to targeting. Specifically, given the nature of a given conflict, she analyzed the applicable law (Hague and Geneva treaty law and customary international law) and when each might apply. She noted that the ICRC position relies on both human rights law and the application of a law enforcement paradigm, which utilizes a behavior-based approach to distinguish civilians from combatants. Hence, when a civilian behaves like a combatant by engaging in hostilities, he loses the protection from attack that is accorded civilians during that action only. In contrast, international humanitarian law uses primarily a status-based approach for distinguishing civilians from combatants. The ICRC in the IG now accepts that a member of an armed group exercising a continuous combat function creates a category that is status based. Logically, then, for status-based targeting decisions to be lawful, LOAC has to prevail over human rights law. Professor Hampson notes, however, that the problem is a bit more complex depending on the nature of the conflict and, in fact, she argued that in some limited circumstances human rights law may prevail.

Brigadier General Cathcart noted that distinguishing civilians from combatants is intelligence driven, and therefore must be well established for purposes of targeting. Any doubt is resolved in favor of finding civilian status.

Finally, Dr. Melzer remarked that the purpose of the IG is to encapsulate the ICRC's interpretation of the current state of international law, and provide key legal concepts that can be used by legal advisors to guide military commanders and develop rules of engagement. Dr. Melzer also clarified that targeting should be based on the combat function of the target. Persons who function as combatants, and who are trained and have the capability to participate in hostilities, are lawful targets. It is the ICRC's view that the question of whether a person loses the protection of civilian status must be determined at the time of targeting. If a civilian joins an organized armed group, such person falls into a continuous combat function and can be lawfully targeted. On the other hand, persons that only intermittently participate in hostilities, without allegiance to any particular organized armed group, can be lawfully targeted only when they are performing a combat function. The intervening periods must be governed by law enforcement principles.

***Panel III: The Changing Character of Weapon Systems:
Unmanned Systems/Unmanned Vehicles***

Panel III, moderated by Villanova University School of Law professor John Murphy, was comprised of Professor Pete Pedrozo of the Naval War College, Hina Shamsi of New York University School of Law, Colonel Darren Stewart of the San Remo Institute and Professor Ken Anderson of American University's Washington School of Law. Its primary focus was unmanned (or remotely piloted) aerial vehicle (UAV) operations in Afghanistan and Pakistan. Ms. Shamsi, Senior Advisor to the Project on Extrajudicial Executions at New York University School of Law and a contributor to a recent United Nations special report on targeted killings (Alston Report), criticized recent UAV operations on multiple grounds, including lack of transparency and accountability, and the extent to which targeted killing destabilizes existing legal frameworks. Professor Pedrozo outlined the legal basis on which CIA-controlled UAVs are operated in Pakistan, while Professor Anderson discussed whether geographic considerations delimit UAV use.

Professor Murphy opened the panel by lauding unmanned drones as systems capable of precision targeting that minimize civilian casualties. In contrast, Ms. Shamsi, a contributor to the Alston Report, criticized drone (UAV) operations, arguing that they make it easier to kill and thereby facilitate an expansion of executions beyond those that are legally justified under international humanitarian law. She further contended that the operation of drones by the CIA, though not illegal under international humanitarian law, should nevertheless be halted because the CIA is not capable of complying with the law of war and is not sufficiently transparent in its operations to verify compliance. Moreover, she concluded, under human

rights law, targeted killings are illegal because they are not designed to accomplish an objective, but are merely to kill. She observed that while the United States, Russia and Israel have all justified drone attacks on the basis of self-defense, this justification cannot stand where the resulting deaths occur in another State's territory, such as in Pakistan.

Professor Pedrozo noted that special rapporteur Alston did not possess a mandate to investigate or render conclusions with respect to international humanitarian law, and thus his assertions should be understood only insofar as they relate to human rights law. Additionally, he observed that CIA operations fully comport with the law of war. He asserted that drone operations taking place in Pakistan against Taliban and al-Qaida forces do not violate Pakistani sovereignty.

Professor Anderson summarized the general view of the international legal community on drones, saying that they may be used in armed conflict or in law enforcement operations, subject to geographic limitations, and are governed by human rights law in those instances when human rights law is not superseded by international humanitarian law. This is in contrast to the view of the United States that drones may be deployed without geographic limitation against combatants wherever they are located when the United States chooses to exercise its lawful right of self-defense.

Colonel Stewart commented that UAVs are like any other weapon platform; they have significant capabilities and vulnerabilities. As a result, to properly evaluate the use of UAVs they must be viewed in the context of the overall military plan or strategy. Only in such context can the UAV targeting be truly determined to be lawful or unlawful. Colonel Stewart also argued that evolving technologies, such as autonomous weapon systems, while enhancing the ability to neutralize threats, tend to replace human judgment with algorithms, a potentially unwise exchange. The legal community must be the driving force to ensure the lawful application and use of such emerging technologies.

*Panel IV: The Changing Character of Tactics: Lawfare in
Asymmetrical Conflicts*

Panel IV delved into the lawfare phenomenon and its growing impact on how warfare is conducted by the United States, Great Britain and Israel. The panel, moderated by Mr. David Graham of The Army Judge Advocate General's Legal Center and School, included Duke University School of Law professor Charles Dunlap, Ms. Ashley Deeks of Columbia Law School, Tel Aviv University professor Pnina Sharvit Baruch and Captain Dale Stephens of the Royal Australian Navy. Substantial comment was made on the September 2009 Report of the United Nations Fact

Finding Mission on the Gaza Conflict prepared by Justice Richard Goldstone (Goldstone Report), and the manner in which Hamas used the report in an effort to discredit and thereby constrain Israel. Observations were also made on the unintended consequences of recent attempts by military forces to limit civilian casualties in Afghanistan, such as the trend by insurgents to embed themselves even more closely and deeply within civilian populations. Professor Sharvit Baruch detailed the lengths to which Israeli forces now go—far above and beyond the requirements of international law—to avoid civilian casualties.

Mr. Graham opened the panel with a discussion of asymmetric urban fighting with non-State actors, highlighting the Goldstone Report. The report discusses the legality of Israeli operations against Hamas in Gaza and finds thirty instances in which Israel purportedly violated the law of armed conflict, including reckless use of white phosphorus and fl  chette munitions. Mr. Graham questioned whether the Goldstone Report portends—or reflects—a fundamental shift in the manner in which principles of the law of armed conflict are applied in asymmetric armed conflict.

Professor Sharvit Baruch discussed the exhaustive approach Israel takes to comply with the law of armed conflict prior to target approval, to include intelligence vetting, legal review of both preplanned and immediate targets, and extensive warnings to civilian populations. She viewed Article 57 (Precautions in Attack) of Additional Protocol I as being customary international law and focused her remarks on Israel’s efforts to comply with its dictates.

Professor Dunlap, to whom the term “lawfare” is largely credited, described it as a method of exploiting the law during armed conflict to achieve operational ends. For instance, just prior to the first Gulf War, the United States purchased satellite imagery of coalition forces from multiple commercial companies, thereby denying that intelligence information to Iraq and obviating the need for military action to keep Iraq from obtaining the imagery.

Professor Dunlap observed that insurgents are adept lawfare operators. He cited as an example that the law of armed conflict does not prohibit civilian casualties during combat operations; they are accepted as collateral damages under rules governing necessity, distinction and proportionality. But when a US official announces that the United States will not engage the Taliban if such engagement would risk the life of civilians, the Taliban will start to embed with civilians. If an attack occurs that kills or injures civilians, although the attack was lawful, media reports are often adverse.

Ms. Deeks spoke on various court decisions and how they divide the United States and its European coalition partners. She focused on four broad categories of litigation: lawfulness of detention, lawfulness of treatment during detention,

lawfulness of a transfer of custody from one State to another and lawfulness of particular intelligence activities. The differing decisions of the US and European courts on such cases are causing tensions in the operational environment. The European courts have provided less deference to the decisions of the executive branch in military and international affairs matters as compared to courts in the United States. As a result of such litigation risk, European military operations may be curtailed to avoid gray areas in the law. In addition, a change in policy brought about by litigation can, over time, have a chilling effect on the willingness of coalition partners to work together and share information. She cited potential steps that could reduce the risk of litigation as including ensuring States' compliance with counterinsurgency (COIN) principles in an effort to win the hearts and minds of the affected population and the establishment of independent non-judicial mechanisms designed to oversee the decisions of the executive branch.

Captain Stephens argued that lawfare is neither good nor bad. Laws by their nature are indeterminate, thereby creating gaps that require filling. Lawfare attempts to take advantage of such gaps. To fill such gaps, legal advisors attempt to use legal principles, which are generally moral concepts. These legal principles, if used properly, can effectively be used as a means of counter-lawfare. One such way is to apply the COIN doctrine in asymmetric conflicts and to emphasize the rule of law in COIN operations as a tool of war.

***Panel V: The Changing Character of International Legal Scrutiny:
Rule Set, Investigation and Enforcement in Asymmetrical Conflicts***

Panel V considered the unprecedented levels of public and judicial scrutiny now being given to the use of armed force. Panel moderator Captain Rob McLaughlin, Royal Australian Navy, and panel members Professor Wolff Heintschel von Heinegg of Europa-Universität Viadrina, Commander Andrew Murdoch of the Royal Navy, Dr. Roy Schöndorf of the Israeli Ministry of Justice and Commander James Kraska, JAGC, US Navy, a member of the Naval War College faculty, examined instances of internal and external scrutiny, such as that occurring as a result of Israeli actions to enforce its naval blockade on Gaza. Concern was expressed that this scrutiny has the potential to dissuade military commanders from militarily appropriate and lawful actions due to the costs and burdens of such scrutiny, irrespective of liability.

Captain McLaughlin began by observing that all countries are subject to intense legal scrutiny in the operational environment, with non-governmental organizations (NGOs), among others, well equipped to conduct independent investigations. Key considerations are who is investigating and the body of law

applied in the investigation. Legal scrutiny is especially significant in the asymmetric context.

Professor Heintschel von Heinegg asserted that the law of armed conflict does not recognize asymmetry. This law simply gives privileged status to certain persons. In asymmetric conflicts, one party attempts to compensate for military weaknesses by taking advantage of the weaknesses imposed on the other party by the law of war. Examples are perfidy and use of human shields, though employing human shields would not necessarily prevent an attack under law of war principles. He maintained that the law of armed conflict is flexible, but often not helpful when applied to asymmetric conflict. He opined that perhaps new law needs to be forged. With respect to investigations, nations must move quickly to publicly supply accurate information as to what had occurred. Professor Heintschel von Heinegg observed that enforcement in the asymmetric context is difficult. He indicated that the International Criminal Court could be useful in this regard, although its value may be overestimated by some.

Commander Murdoch reviewed three cases to demonstrate the manner in which recent court decisions and related public scrutiny have negatively influenced British operational commanders. In each case there has been some form of military justice, civil proceeding, parliamentary review and/or public inquiry that took years to complete. This level of scrutiny is very costly in time and resources. It also exposes military and government personnel to personal and reputational risk. To help offset such risk, the military requires a well-resourced operational capability to respond to and, if possible, preempt a judicial challenge.

Dr. Schöndorf offered the perspective that Hamas has engaged in lawfare by routinely accusing Israel of war crimes. The purpose of the allegations was to damage Israel's reputation and force investigations. These tactics can be very effective for non-State actors because once an allegation is made, the reputation of the accused State is immediately compromised. The non-State actor does not face the same risk. In addition, once an allegation is made a democratic State will take such an allegation seriously and conduct an investigation. In contrast, a non-State actor has no similar interest in conducting its own investigation and there is no public expectation that it do so. As a result, to discredit these allegations, nations are forced to expend enormous amounts of time and resources, but by the time the results of such investigations are completed the public is no longer concerned with the incident.

Commander Kraska addressed the question of whether Israel's naval blockade of Gaza is subject to the law of naval warfare or the law of the sea. While noting disagreement, he argued that the law of naval warfare on blockade is applicable, even if the hostilities do not constitute international armed conflict, because the area is

one of continuous violence. This, he suggested, is consistent with the US Supreme Court interpretation of international law involving the North's blockade of the South in the American Civil War.

Closing Address

Professor Emeritus Yoram Dinstein of Tel Aviv University, the 1999 and 2002 Stockton Professor at the Naval War College, delivered the closing address. His remarks focused on the fact that scholars and military practitioners of the law of armed conflict have become too defensive and apologetic in the face of both (i) lawfare, which is used effectively by the adversaries of civilized nations, and (ii) increased pressure brought to bear by overzealous human rights activists and NGOs who desire a “regime change” from the law of armed conflict to human rights law. His basic theme was that there is no reason to be defensive; in fact, the focus of the discussion and the tone of the response need to be changed.

In Professor Dinstein's view, there are two modern phenomena that have led civilized nations to become excessively apologetic and defensive when waging war. The first is that the “barbarians at the gate”—rogue States and terrorist organizations—are exploiting a lesson from armed conflict in Vietnam, that is, that a civilized nation's warfighting effort can be effectively impeded by eroding public support for pursuing victory. In the war in Afghanistan, public support for confronting the enemy is eroded by highlighting civilian casualties as collateral damage in the course of hostilities. “We” (whom he defined as the scholars and military practitioners of civilized nations) have, in fact, allowed false notions about the unacceptability of civilian casualties, under the law of armed conflict, to take root and unnecessarily hamper our military operations. He stressed that the law of armed conflict takes civilian casualties as collateral damage for granted, and only requires belligerent parties to minimize them.

The second phenomenon is that NGOs and others assert—wrongly and dangerously—that human rights law supplants the law of armed conflict. The human rights NGOs have contributed to a misperception that lawful State action is unlawful. Undeniably, human rights law can fill gaps in the law of armed conflict, where such gaps exist. The crux of the matter, however, is that the law of armed conflict constitutes *lex specialis*. It has been recognized as such by consistent State practice and by judicial opinions.

Professor Dinstein believes that, if civilized nations are to prevail, scholars and military practitioners need to change the tone and tenor of the debate, making sure that the response to spurious criticisms is widely heard and understood.

Conclusion

We hope that the thought-provoking articles published in this “Blue Book” will add to—and help shape—the debate on the multiple complex emerging legal issues presented by the changing character of war. The legal insights offered here to legal practitioners and scholars should assist them as they address these and other issues that may evolve in future conflicts.

This “Blue Book” would not have come to fruition had it not been for the enormously successful conference made possible in large measure by the conference committee under the leadership of Major Mike Carsten, US Marine Corps, working with Mrs. Jayne Van Petten of the International Law Department, and the support provided by the Naval War College Foundation, the University of Texas School of Law, the International Institute of Humanitarian Law, the Lieber Society on the Law of Armed Conflict (American Society of International Law) and the *Israel Yearbook on Human Rights*. We thank these individuals and organizations for their enduring support and generosity.

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PART I

OPENING ADDRESS

I

Combating Terrorists: Legal Challenges in the Post-9/11 World

Nicholas Rostow*

Introduction

It is a great pleasure to be back at the Naval War College and an extraordinary honor to be opening this conference. As I look out, I see colleagues of long standing. More important than that, although that fact is important, I see colleagues who have been my teachers as I have pursued my own work.

The annual International Law Department conferences famously address the most difficult and contentious topics in the field known variously as the law of armed conflict, laws of war and international humanitarian law (IHL). (While I regard these terms as coextensive, not everyone does, which itself is a source of confusion and controversy.) The coverage of this conference is equally broad and challenging: detention, civilianization of warfighting, the meaning of “direct participation in hostilities,” the impact of drones, asymmetric warfare, and issues of enforcement and accountability. I imagine discussion also will touch on embargoes and blockades. These topics are of operational, not just academic, interest. Participants here are well known for taking real-world concerns into account. This fact alone sets the conference apart.

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The themes to be examined over the next few days highlight different perspectives within the legal and political communities worldwide. While Americans may have fewer difficulties with seeing terrorists in the context of armed conflict than Europeans and others, this phenomenon is only a shorthand way of referring to differences of view that are of legal, political and social significance. At a conference in England recently, a US official was surprised to discover that the health of the International Criminal Court was the thermometer for gauging the health of the entire international legal system.

I thought therefore to begin our conference with some thoughts about the UN Human Rights Council Report, dated May 28, 2010, of Professor Philip Alston of the New York University School of Law on “extrajudicial, summary or arbitrary executions,” including “targeted killings.”¹ It merits attention because the subject is at the center of debate about the lawful use of lethal force against terrorists and those who support, harbor, direct or finance them. It takes us back to September 2001 and the rejection of a law enforcement-only—or mainly law enforcement—approach to combating terrorism.

Alston’s approach raises a number of questions and highlights a number of issues. I shall therefore begin with a summary of the argument and then note some questions about its assumptions and conclusions.

The Alston Report

Legal questions in armed conflict turn most often on the weapon chosen, the target and collateral damage. Lately, the extent and definition of the battlefield, particularly when combating terrorists, also are issues for analysis and debate. In addition, as a result of the International Court of Justice advisory opinion on the Israeli “wall,”² whether or not a State has a right of self-defense under international law against attacks—either planned or executed—by terrorist groups, that is, non-State actors, continues to concern policymakers and commentators alike. To begin, I should make clear my views on this issue: terrorist groups such as Al Qaeda and others are engaged in hostilities with the United States and other States even though they are not themselves States. States from which they operate have an obligation under international law, whether customary or derived from binding UN Security Council resolutions, such as Resolution 1373 (2001),³ or treaties, to prevent terrorist groups from engaging in attacks and to put a stop to active and passive support for terrorism. When a State is unable to carry out this duty, the State suffering attack is not without recourse, including an inherent right to use force if necessary and proportionate in self-defense. The necessity requirement is hardly trivial. Nor is the proportionality requirement: that quantum of force reasonably

necessary to bring an end to the condition giving rise to the right to use force in self-defense in the first instance. The use of force must conform to requirements in the law of armed conflict as well.⁴

Alston's Report has stimulated much interest because it addresses subjects of current concern. He begins by focusing on unmanned aerial vehicles and weapons fired from them as among the most controversial instruments in the conflict with terrorists. He asserts that "a missile fired from a drone is no different from any other commonly used weapon, including a gun fired by a soldier or a helicopter or gunship that fires missiles. The critical legal question is the same for each weapon: whether its specific use complies with IHL."⁵ Alston concludes that assessment of each use of force to ensure compliance with the requirement of proportionality must be made with respect to "each attack individually, and not for an overall military operation."⁶ He thus elides the *jus ad bellum* and the *jus in bello*. Each operates in different contexts and with different understandings; treating them as one leads to confusion, mistake of law and uncertainty. Recognizing that the proportionality standard must be met for a use of force to be lawful and that the principle of discrimination between military and civilian targets is at the core of the modern law of armed conflict, Yoram Dinstein put it better than Alston: those who plan attacks need to take into account the duty to minimize civilian casualties.⁷

Perhaps because his audience is the UN Human Rights Council and perhaps because the focus of his own work is international human rights law, Alston looks at uses of force with international human rights concerns foremost in his mind. (This observation in no way suggests that I do not share his aspirations for a world that respects and protects human rights.) Let us see what Alston does with his perspective.

First, he takes a more limited view than I suspect would be shared in this auditorium of what constitutes a legitimate target for killing in armed conflict: "'combatant' or 'fighter' or, in the case of a civilian, only for such time as the person 'directly participates in hostilities.'"⁸ Alston states, without analysis,

It is not easy to arrive at a definition of direct participation that protects civilians and at the same time does not "reward" an enemy that may fail to distinguish between civilians and lawful military targets, that may deliberately hide among civilian populations and put them at risk, or that may force civilians to engage in hostilities. The key, however, is to recognize that regardless of the enemy's tactics, in order to protect the vast majority of civilians, direct participation may only include conduct close to that of a fighter, or conduct that directly supports combat. More attenuated acts, such as providing financial support, advocacy, or other non-combat aid, does [*sic*] not constitute direct participation.⁹

Alston asserts that “direct participation” excludes activities that may support “the general war effort,” e.g., “political advocacy, supplying food or shelter, or economic support and propaganda.”¹⁰ He adopts what he calls the “farmer by day, fighter by night”¹¹ distinction to protect the daytime farmer from being a legitimate target. Such an approach, which is included in Additional Protocol I¹² (and one of the reasons the United States is not a party), favors the terrorist. (My lawyer would have me say “arguably favors.”) Alston prefers the guidance of the International Committee of the Red Cross with respect to direct participation in hostilities—it may stop and start on a continuing basis. One becomes a legitimate target only when engaged in a targetable activity.¹³ This is not a position that will win many advocates among those engaged in combating terrorists and their attacks. Further, if his goal is “to protect the vast majority of civilians,”¹⁴ then one might have thought he would have emphasized the importance of suppressing terrorism. Thus, Alston’s Report suffers by seeming not to take terrorism so seriously as governments and publics do.

The UN Security Council has suggested that one take a broader view. In Resolution 1373, adopted following the 9/11 attacks, the Security Council “decided” that all States shall

[e]nsure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts.¹⁵

While engaging in criminal support for terrorism may not per se make one a lawful target, it does suggest that Alston is rather too quick to narrow the categories of legitimate military targets. I assume that he would regard command and control, training and supplying of materiel as putting one in the category of legitimate target, but the fact that he excludes financiers raises a question. By not evaluating the impact of UN Security Council resolutions on his assumptions, Alston undermines the usefulness of his work.

Achieving a general definition of terrorism has bedeviled the international community. At the same time, through a series of UN Security Council resolutions and multilateral treaties, the same community has narrowed the definitional gap for disagreement about whether a particular act is, or is not, terrorist by defining acts usually committed by terrorists as “terrorist.” Alston seems to define “terrorist” in such a way as to make status severable, as Professor Harvey Rishikof likes to say.

Thus, for Alston, the terrorist can be many things at once, each one separable from the other, with different legal consequences for each.

Second, Alston's emphasis on international human rights law in the fight against terrorists creates a legal unreality for those who combat terrorism. UN Security Council resolutions are both more inclusive and more vague. Their language reflects political compromises achieved through the drafting process, compromises that allow unanimous adoption of counterterrorist resolutions. Thus, UN Security Council resolutions routinely reaffirm

that terrorism in all its forms and manifestations constitutes one of the most serious threats to international peace and security . . . [and] the need to combat by all means, in accordance with the Charter of the United Nations and international law, including applicable international human rights, refugee and humanitarian law, threats to international peace and security caused by terrorist acts.¹⁶

Those engaged in combating terrorism can use this Security Council language as a standard against which to evaluate plans. Alston's failure to consider the impact of Resolution 1373 and other Security Council counterterrorism resolutions limits the operational utility of his work.

Alston insists that the laws of war and international human rights law apply in the context of armed conflict without analyzing either how they do or the consequences for military operations. Thus, Alston asserts, where the law of armed conflict is unclear or uncertain, "it is appropriate to draw guidance from human rights law."¹⁷ He does not specify the content of such law and whether, to the extent it derives from treaties, all or just some States are parties. The same is true in his treatment of the law of armed conflict as his references to the 1977 Geneva Additional Protocols show.

Alston's operational concern is procedural. He argues that, as a result of failing to disclose the legal basis for individual targeting decisions and who has been killed with what collateral consequences, "clear legal standards [have been displaced] with a vaguely defined license to kill, and the creation of a major accountability vacuum."¹⁸ As Alston notes, targeted killings have taken place in a variety of contexts—Russia's war in Chechnya, the US war with Al Qaeda, Sri Lanka's war with rebel groups, and Israel's wars with Arab States, quasi-States and groups are a few examples. Alston sums up the situation as follows:

Although in most circumstances targeted killings violate the right to life, in the exceptional circumstance of armed conflict, they may be legal. This is in contrast to other terms with which "targeted killing" has sometimes been interchangeably used, such as

“extrajudicial execution,” “summary execution”, and “assassination”, all of which are, by definition, illegal.¹⁹

This approach to conceptually distinct acts reflects a rush to conclusion based on insufficient and imprecise analysis. The US official position, for example, is different.

The US View

Harold Koh, the State Department Legal Adviser, gave the Obama administration position in a speech in March 2010 to the American Society of International Law.²⁰ He made a number of significant points that assist in deciding who is and who is not a lawful target. First, Mr. Koh said that the United States is engaged in a number of armed conflicts simultaneously: “In the conflict occurring in Afghanistan and elsewhere, we continue to fight the perpetrators of 9/11: a non-state actor, al-Qaeda (as well as the Taliban forces that harbored al-Qaeda).” With respect to targeting, he stated, “U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war.”

With regard to the authority to use force, Mr. Koh stated, “As a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law.” He continued, “[I]n this ongoing armed conflict, the United States has the authority under international law, and the responsibility to its citizens, to use force, including lethal force, to defend itself, including by targeting persons such as high-level al-Qaeda leaders who are planning attacks.” This point is important as all decisions about targeting, the location of the conflict and treatment of prisoners flow from it.

Mr. Koh stated that the United States recognizes the applicability of the law of armed conflict, and the core principles of distinction and proportionality. Targeting individuals who are legitimate military objectives, such as commanders, planners, supporters and the like, is within international law. Killing such persons is not to deprive them of judicial due process, for none is due, and does not violate US legal prohibitions on assassination for the same reason: legitimate and lawful acts of self-defense are not crimes. Finally, Koh defends the use of unmanned vehicles as increasing the precision of attacks and limiting collateral damage. In this respect, Alston shares the US view.

The US position raises questions just as the Human Rights Council report does. The question of the use of precision weapons is one such issue. What legal consequences flow from possession of them? Do they affect the way a State, as a matter of

law, must conduct military operations, including those in exercise of the inherent right of self-defense codified in Article 51 of the UN Charter? Do precision weapons eliminate recognition that error is endemic to warfare and mean that civilian casualties, if they occur, must be intended (as the Goldstone Report suggests)?²¹ How does the requirement to distinguish between military and civilian targets affect, if it does, the right to use force in self-defense when the State with the right does not possess precision weapons, and its enemy hides among, or otherwise exploits, civilians?

These and other questions spring to mind in the course of studying the Alston Report and such other Human Rights Council documents as the Goldstone Report.²² Each of them raises more questions than it answers. Alston raises a further issue: the status of Central Intelligence Agency officers engaging in armed conflict with Al Qaeda and its allies. Do they, as Alston asserts, not enjoy combatant status even if they meet the requirements of the Geneva Conventions? Should one distinguish between the CIA officer engaged in cloak and dagger and those who engage in military operations and look and behave like the regular armed forces except for the source of their paychecks?

Conclusion

We shall be discussing these and other issues in the next few days. Their importance to success in the effort to combat terrorism and terrorists is hard to overstate. Other issues are significant as well. They include the fact, which seems often to be forgotten, that the use of force is a political act aimed at political objectives. This is true whether the goal is capitulation or change of policy. For the United States, the goals invariably include persuading the adversary to comply with international legal standards of behavior. At the same time, the tactical choices made also have political consequences. These need to be considered as one goes forward with a use of force. In addition, calls for the introduction of judicial process into military decisions, not just the detention of prisoners, seem to be growing louder. Is such involvement of the judiciary necessary or wise? And what are the consequences of introducing judicial process as a routine part of military operations?

As the war with Al Qaeda and its associates continues with no end in sight and with some groups pressing for criminal prosecutions of those fighting terrorists, getting the analysis and argument right is a political and legal necessity. Professor Alston's Report is not wrong in every respect; neither is it right—therefore more and better needs to be done. This conference will do some of that work.

Notes

1. Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, Human Rights Council, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston), *available at* <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf> [hereinafter Alston Report].
2. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9).
3. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).
4. *See, e.g.,* C.H.M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECUEIL DES COURS 455 (1952); MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION* (1961); YORAM DINSTEIN, *WAR, AGGRESSION, AND SELF-DEFENCE* (4th ed. 2005); and my own discussion in *Wall of Reason: Alan Dershowitz v. The International Court of Justice*, 71 ALBANY LAW REVIEW 953 (2008).
5. Alston Report, *supra* note 1, ¶ 79.
6. *Id.* ¶ 93.
7. YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 126 (2004). (Of course, the nuclear weapon raises a question about all these principles.)
8. Alston Report, *supra* note 1, ¶ 30. Alston cites Common Article 3 of the Geneva Conventions as support for his assertion. It does not provide support but deals with an entirely different subject.
9. *Id.* ¶ 60 (citation omitted).
10. *Id.* ¶ 61.
11. *Id.*
12. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 422 (Adam Roberts & Richard Guelff eds., 3d ed. 2000).
13. Alston Report, *supra* note 1, ¶ 62.
14. *Id.* ¶ 60.
15. S.C. Res 1373, *supra* note 3, ¶ 2(e).
16. *See, e.g.,* S.C. Res. 1904, pmbl. ¶¶ 3–4, U.N. Doc. S/RES/1904 (Dec. 17, 2009).
17. Alston Report, *supra* note 1, ¶ 29.
18. *Id.* ¶ 3.
19. *Id.* ¶ 10 (citations omitted). Alston cites Michael Schmitt and Hays Parks for the proposition that “extrajudicial execution,” “summary execution” and “assassination” are illegal.
20. Harold Hongju Koh, Legal Adviser, US Department of State, Remarks at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), <http://www.state.gov/s/l/releases/remarks/139119.htm>.
21. U.N. Human Rights Council, *Human Rights in Palestine and Other Occupied Arab Territories, Report of the United Nations Fact Finding Mission on the Gaza Conflict* ¶¶ 61, 730, 838, 985, U.N. Doc. A/HRC/12/48 (Sept. 29, 2009) (Richard Goldstone), *available at* <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf>.
22. *See, e.g.,* Nicholas Rostow, *The Human Rights Council (Goldstone) Report and International Law*, 40 ISRAEL YEARBOOK ON HUMAN RIGHTS 275 (2010).

PART II

**OVERVIEW: INTERNATIONAL LAW
CHALLENGES IN ASYMMETRICAL WAR**

II

Mission Impossible? International Law and the Changing Character of War

John F. Murphy*

As a participant in the conference “International Law and the Changing Character of War,” in this article I hope to present and support the thesis reflected in the title to this essay, i.e., that the use and abuse of international law and the changing character of war have combined to place major obstacles in the way of the successful prosecution of armed conflict by US forces and their allies. In support of this thesis, I shall be drawing extensively on examples arising out of “the changing character of weapon systems” panel, but I shall also be exploring other dimensions of “the changing character of war” to buttress this support.

I. Challenges Posed by the Changing Character of Weapon Systems

In the panel “The Changing Character of Weapon Systems: Unmanned Systems/Unmanned Vehicles,” an overarching theme was the issue whether the use of these new weapon systems was compatible with international law. As noted in particular in Professor Pedrozo’s article,¹ the criticisms of the use of unmanned systems to attack adversaries outside of traditional combat zones like Afghanistan and Iraq have

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been especially sharp. The primary focus of the critics has been on the Central Intelligence Agency's (CIA) use of armed drones, a prime example of an unmanned aerial system or unmanned aerial vehicle, to kill leaders of the Taliban or Al-Qaeda in the Federally Administered Tribal Areas (FATA) of Pakistan.

I make no attempt to address all of the numerous arguments advanced by the critics of the drone attacks, but rather limit my discussion to two closely related arguments: first, that the civilian nature of the CIA personnel utilizing the armed drones precludes them from engaging in armed conflict, and if they engage in armed conflict, this renders them "unlawful combatants"; and second, outside of Afghanistan and Iraq, the United States is not engaged in an armed conflict with the Taliban, Al-Qaeda or any other militant or terrorist group. If such attacks occur outside of an armed conflict, they must be treated as criminal acts and not armed attacks that give rise to the right to use military force in self-defense. Rather, they must be combated by law enforcement measures and governed by international human rights law, not the law of armed conflict, or, as some prefer to call it, international humanitarian law. Because armed drones are not law enforcement tools, the critics contend, they may not be used outside of combat zones.

The Effect of the CIA's Status as a Civilian Government Agency

One of the most persistent critics of the CIA's use of armed drones has been Mary Ellen O'Connell, holder of the Robert & Marion Short Chair in Law at Notre Dame University. According to Professor O'Connell, the CIA is not bound by the Uniform Code of Military Justice of the United States to respect the laws and customs of war and therefore it does not.² Moreover, according to O'Connell:

Under the law of armed conflict, only lawful combatants have the right to use force during an armed conflict. Lawful combatants are the members of a state's regular armed forces. The CIA are not members of the U.S. armed forces. They do not wear uniforms. They are not subject to the military chain of command. They are not trained in the laws of war, including the fundamental targeting principles of distinction, necessity, proportionality, and humanity.³

O'Connell's remarks presume that the law of armed conflict governs the CIA's use of armed drones in the FATA in Pakistan. This is a debatable point; we shall return to the issue below. But assuming *arguendo* that it does, the law of armed conflict does not prohibit civilians, including intelligence agents, from participating in hostilities. As Pedrozo points out,⁴ even Philip Alston, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, in his study on targeted killings, has conceded this point.⁵ Moreover, the use of armed drones by CIA personnel does not necessarily constitute a war crime if it results in a death in the FATA.⁶

Only if the killing itself is conducted in a manner prohibited by the law of armed conflict, e.g., it involves the deliberate targeting of civilians not directly participating in hostilities, does it constitute a war crime. Under such circumstances, it is irrelevant who conducts the targeted killing, intelligence personnel or State armed forces; the actor who committed the killing, plus those who authorized it, can be prosecuted for war crimes.⁷

The civilian status of the CIA personnel does have other significant consequences. First, if they are captured by the enemy, they are not entitled to prisoner of war status. It is a matter of some debate whether they are to be treated as civilians or as unlawful combatants while they are detained.⁸ Second, they may be attacked, either as members of an organized armed group or as civilian direct participants in hostilities. Third, they enjoy no belligerent immunity for their actions and thus may be prosecuted, either for war crimes (e.g., deliberately killing civilians) or domestic crimes (e.g., murder) in a national court.⁹ In other words, the absence of the right on the part of CIA personnel to participate directly in hostilities within the meaning of Article 43(2) of Additional Protocol I¹⁰ has consequences, but is not in itself a violation of the law of armed conflict.

At this writing, the media are full of commentary on the release of 75,000 US military documents on the war in Afghanistan by WikiLeaks. Although much of the commentary has focused on reports in the documents of Pakistan's Inter-Services Intelligence Directorate assisting the Taliban in Afghanistan in their use of improvised explosive devices (IEDs) against members of the Afghan government and coalition forces, there are also many reports in the documents of the fallibility of aerial drones. For example, one document reported that communications were lost with a Reaper drone, armed with Hellfire missiles and 500-pound bombs, and an F-15 fighter plane had to be ordered to shoot it down before it crossed into Tajikistan.¹¹ These documents also reportedly indicate that some reports of civilian casualties were never made public.¹²

At this writing there are also conflicting reports about an attack by coalition forces occurring on July 23, 2010 that Afghan sources claim killed fifty-two civilians, a claim that has been denied by NATO officials, who stated that an investigation NATO was conducting "has thus far revealed no evidence of civilians injured or killed."¹³ To be sure, reports of large numbers of civilians killed in Afghanistan are not something new. Indeed, tensions between the Karzai government and the US government over civilian casualties allegedly caused by airstrikes have been a long-standing problem. As I stated on another occasion:

Although the law of armed conflict clearly prohibits an intentional direct attack against the civilian population as such, and indeed categorizes it as a war crime, "there can be

no assurance attacks against combatants and other military objectives will not result in civilian casualties in or near such military objectives.” In the latter case, the civilian casualties are known as “collateral damage” and do not give rise to accountability of the attacker. Nonetheless, as the sovereign government of Afghanistan, President Karzai can order the complete cessation of airstrikes (he has done so on occasion), and as a matter of international law, the United States and its allies are bound to comply—even though such airstrikes are a crucially important factor in the battle against the Taliban, and the Taliban regularly intermingle among the civilian population in order to use them as human shields (itself a violation of the law of armed conflict) and then use civilian casualties as part of their war propaganda effort. In short, the Taliban has been successfully engaging in so-called “lawfare,” using false accusations of violations of the *jus in bello* in order to win public opinion to their side.¹⁴

Although the documents released by WikiLeaks apparently do not report the intentional targeting of civilians by CIA personnel in either Afghanistan or Pakistan, they do “suggest that the CIA has sharply increased its use of paramilitary units in Afghanistan, and provide details of unintended killings of civilians by Task Force 373, a secret unit set up to kill or capture militant leaders.”¹⁵ Such unintended killings do not constitute war crimes but they greatly undermine the war effort and increase the pressure on the Afghan government to prevent their recurrence,¹⁶ as well as provide material for the Taliban war propaganda effort.

The civilian status of the CIA drones also has legal significance. Rule 17 (a) of the air and missile warfare manual,¹⁷ which, while it has no official status, is the product of a team of experts on the law of armed conflict and has been well received by governments, provides that only military aircraft are entitled to engage in armed attacks. There is no question that CIA drones are not military aircraft. It is arguable that rule 17 (a) of the manual reflects customary international law. If this argument is valid, the use of CIA drones in an international armed conflict would be a violation of the customary law of armed conflict.¹⁸

There is a serious issue, however, as to whether the CIA drones are being used in an “international armed conflict,” because of the ambiguity of the concept as applied to current circumstances. In his leading treatise on the law of international armed conflict, Yoram Dinstein defines an international armed conflict as limited to conflicts “raging between two or more sovereign States.”¹⁹ As Dinstein acknowledges, however, “drawing a line of demarcation between inter-State and intra-State armed conflicts is not as simple as it appears to be at a cursory glance.”²⁰ He points to Afghanistan in 2001 as an example. Prior to 2001 the Taliban regime fought a long-standing civil war with the Northern Alliance, which clearly constituted solely an internal armed conflict. In 2001, however, the Taliban regime, which because of its control over most of the territory of Afghanistan constituted the *de facto* government of Afghanistan, “got itself embroiled in an inter-State war

with an American-led Coalition as a result of providing shelter and support to the Al-Qaeda terrorists who had launched the notorious attack against the US on 11 September of that year”²¹

Under current circumstances, however, the Taliban are no longer the de facto government of Afghanistan. Rather, the Karzai government is both the de facto and de jure government of Afghanistan. For their part the Taliban are involved in an insurgency against the Karzai government and use the FATA as a safe haven from which their forces and Al-Qaeda forces launch cross-border attacks into Afghanistan. Moreover, because of the deteriorating situation between the Taliban in Pakistan and the Pakistan government, it is arguable that the Taliban in Pakistan have launched an insurgency against the Pakistan government.

If this scenario has some plausibility, then some further comments by Dinstein may be apposite:

A non-international armed conflict arising in State A may also have spillover horizontal effects within a neighboring country (State B). . . . In this scenario, insurgents against the Government of State A find temporary shelter within State B and ignite another “civil war,” this time against the Government of State B. As long as the two governments of States A and B (acting separately or in cooperation with each other) wage hostilities against the insurgents, the two simultaneous conflicts—despite their cross-border effect—remain non-international in character. But if the two Governments become embroiled in combat against each other, the armed conflict changes its character and becomes inter-State.²²

One may plausibly argue that Afghanistan and Pakistan are currently in the same position as States A and B in Dinstein’s hypothetical. If so, it needs to be noted further that, although there are tensions between the Pakistan and Karzai governments, there is at present no armed combat between them. It well may be, then, that the conflicts in both Afghanistan and Pakistan should be classified as non-international in character.

If it is correct to classify both of these conflicts as non-international, the civil status of CIA personnel or of CIA drones becomes irrelevant. This is because there is no counterpart in the law of non-international armed conflicts to Article 43(2) of Additional Protocol I. To the contrary, States often use their police and intelligence services in the fight against rebels. As to the status of aircraft, rule 17 (a) of the air and missile warfare manual’s requirement that only military aircraft are entitled to engage in armed attacks expressly does not apply to non-international armed conflicts.

Parenthetically, it may be noted that in *Hamdan v. Rumsfeld*,²³ the US Supreme Court rejected the assertion by the US government that since Al-Qaeda was not a

State and had not accepted to be governed by the rules set forth in the Geneva Conventions, its affiliates could not invoke their protections. Rather, the Court held that the so-called “war on terror” was a non-international armed conflict, and therefore that at a minimum Article 3, which is common to all the Geneva Conventions, applies to the conflict with Al-Qaeda. The validity of this holding as a matter of international law is debatable, however, since, as Dinstein has argued, “from the vantage point of international law . . . a non-international armed conflict cannot possibly assume global dimensions.”²⁴ Michael Schmitt buttresses this conclusion by noting that Common Article 3 itself defines the conflict to which it applies as “not of an international character occurring in the territory of one of the High Contracting Parties.”²⁵

Even the language Schmitt quotes from Common Article 3, however, has been subject to different interpretations. On the one hand, it can be interpreted as referring only to “internal” armed conflicts, that is, civil wars or insurgencies. This appears to be the interpretation Schmitt favors. On the other hand, it can be interpreted as referring more broadly to any armed conflict that is not between States. This appears to be the interpretation that the US Supreme Court in *Hamdan* favors. Under the latter approach the phrase means occurring in the territory of “at least one of the High Contracting Parties.”²⁶

These arguments favoring conflicting interpretations of Common Article 3, while interesting, need not be resolved for purposes of resolving the issue of the effect of the CIA’s civilian status, because neither interpretation would support the proposition that the “war on terror” is an international armed conflict. In this case, then, the civilian status of the CIA is irrelevant for determining whether the CIA’s use of drones is compatible with international law.

As Schmitt has noted, however, the Supreme Court in *Hamdan* “neglected to explain how it arrived at the determination that the ‘war’ with Al Qaeda qualified as an ‘armed conflict,’ a term of art in the law of war”²⁷ and the “condition precedent for applicability of the law of war.”²⁸ We now turn to this issue.

Is the United States Engaged in an Armed Conflict with Al-Qaeda or Any Other Militant or Terrorist Group?

Neither the Geneva Conventions nor Additional Protocol I contains a definition of an “armed conflict.” In contrast, Additional Protocol II defines non-international armed conflicts in such a way as to sharply limit the scope of the Protocol.²⁹ Paragraph 1 of Article 1 of Additional Protocol II applies to all armed conflicts not covered by Additional Protocol I and

which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

Paragraph 2 of Additional Protocol II then provides that “[t]his Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.”

In the 1995 *Tadic* Interlocutory Appeal on Jurisdiction,³⁰ the International Criminal Tribunal for the former Yugoslavia addressed the preliminary issue of the existence of an armed conflict in response to a contention by the defendant that there had been no active hostilities in the area of the alleged crimes at the relevant time:

[W]e find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.³¹

The question whether the US conflict with Al-Qaeda qualifies as an armed conflict is not easily answered. The only time this conflict could have qualified as an international armed conflict would have been when the United States invaded Afghanistan in 2001 and then only to the extent that Al-Qaeda forces were integrated into the Taliban forces, the de facto army of Afghanistan. At present, as noted previously, both the Taliban and Al-Qaeda are fighting as insurgents in Afghanistan, and it is arguable that the conflict there now is an internal armed conflict. The conflict in Afghanistan may even be within the scope of Additional Protocol II because arguably the Taliban and Al-Qaeda exercise such control over parts of southern Afghanistan as to enable them “to carry out sustained and concerted military operations.” These operations, the argument would continue, constitute “protracted” internal armed violence rather than just “isolated and sporadic” armed violence.

Assuming *arguendo* the validity of these arguments, they do not pertain outside of Afghanistan, and Al-Qaeda violence in other places would not seem to fall within the scope of Additional Protocol II. It must be noted, however, that the

United States is not a party to Additional Protocol II, and it is debatable whether the Protocol's definition of an internal armed conflict is part of customary international law. Alternatively, some commentators have argued that the law of armed conflict, or international humanitarian law, is a "living" body of doctrine that aims to protect people to the maximum extent possible and thus should be interpreted in a way that fills gaps. They point to the Appeals Chamber decision in the *Tadic* case to support the proposition that for purposes of Common Article 3, "armed conflict" should be broadly interpreted to cover as many people as possible.³²

Even if the conflict between the United States and Al-Qaeda and other militant or terrorist groups is not an "armed conflict" within the meaning of the law of armed conflict, it does not necessarily follow that the drone attacks in Pakistan violate international law. As discussed at some length in Professor Pedrozo's article, the drone attacks in Pakistan are compatible with the United Nations Charter, specifically Article 2(4) and Article 51, as an exercise of the right of self-defense.³³ For my purposes, I will comment on only one aspect of the debate over self-defense: Article 51's requirement that the use of armed force be in response to an armed attack.³⁴

The proper interpretation and application of Article 51 have been the subject of much debate.³⁵ One of the most hotly debated issues has been whether Article 51 simply preserves the right of self-defense as it existed under customary international law prior to adoption of the Charter or places further limits on that right. Prior to the adoption of the Charter, the test most cited by the commentators for judging whether the use of force was justified as an act of self-defense was that of US Secretary of State Daniel Webster in the *Caroline* case, i.e., whether the "necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation."³⁶

The words "if an armed attack occurs" have raised the issue as to whether Article 51 has limited the scope of the self-defense doctrine. Some have argued that the words should be read narrowly so as to eliminate the possibility of anticipatory self-defense that other commentators have argued is available under the *Caroline* criteria.³⁷ There is no need to try to resolve this debate for present purposes, because there is no doubt that US and coalition forces have been subject to numerous and continuous armed attacks by Al-Qaeda and Taliban forces based in the FATA and that the use of armed force in the form of drones is necessary to try to prevent the continuation of such attacks. Moreover, as President Obama has recognized, the United States "cannot tolerate a safe-haven for terrorists whose location is known, and whose intentions are clear,"³⁸ because it is difficult, if not impossible, to win a conflict against insurgents if they are able to retreat to a safe haven in another country.

In sum, then, it appears that the claim that the CIA use of drones in Afghanistan and Pakistan is incompatible with international law is not well-founded. But merely having the better legal case in this argument may constitute a pyrrhic victory if the use of drones results in Al-Qaeda and the Taliban gaining more popular support in Afghanistan and Pakistan and increased recruits for their forces.

In his article Professor Pedrozo denies that the use of drones has resulted in more popular support for Al-Qaeda and the Taliban or has in any way assisted Al-Qaeda recruitment efforts. To support his contention, Pedrozo points out that the arguments of opponents are based on exaggerated civilian casualty figures and usefully notes the results of various independent studies indicating, *inter alia*, that drone strikes have effectively impaired Al-Qaeda operations and have not aided Al-Qaeda recruitment efforts.³⁹

Although the results of these studies are encouraging, I am not entirely convinced that they demonstrate the ineffectiveness of Al-Qaeda and Taliban propaganda. For example, although they demonstrate that civilian casualty figures are exaggerated, it is not clear that this message is effectively bought home to either the Afghan or Pakistani government or, more important, the large coterie of young Muslim men who are the primary target of Al-Qaeda and Taliban propaganda.

General Stanley A. McChrystal, who was in charge of US forces in Afghanistan until he was removed by President Obama in June 2010 because of unacceptable remarks made about the President's national security team to a journalist writing for *Rolling Stone* magazine, responded to pressure from the Karzai government and human rights advocates who claimed that US drone and other armed attacks were resulting in unacceptable numbers of Afghan civilian deaths by issuing a directive that placed significant restrictions on US troops attacking people suspected of being militants or destroying buildings used to harbor insurgents. Troops widely complained that the restrictions exposed them to excess risk by limiting their right to use force in self-defense. When General David H. Petraeus, who was appointed to replace McChrystal, took over command of American and NATO forces on July 4, 2010, he was faced with a difficult choice. On the one hand, he was sensitive to the need of his troops to protect themselves. On the other, the restrictions were reportedly popular with Afghan officials and human rights advocates who claimed that the restrictions had led to a significant reduction in Afghan civilian deaths.⁴⁰ At this writing Petraeus is reportedly ready to issue a new tactical directive that will expand restrictions on artillery strikes and aerial bombardment but clarify that troops have the right to self-defense. His goal will reportedly be to "persuade the troops that the unpopular rules will pay off in trust won on the ground."⁴¹

On August 1, 2010, Petraeus distributed counterinsurgency guidelines to troops. Reportedly, a large part of these guidelines, written by General Petraeus, is

aimed at the information side of the war. For example, he writes, “Be first with the truth. Beat the insurgents and malign actors to the headlines.” “Avoid premature declarations of success.” “Strive to underpromise and overdeliver.” When things go wrong, he says, tell the truth: “Avoid spinning, and don’t try to ‘dress up’ an ugly situation. Acknowledge setbacks and failures, including civilian casualties, and then state how we’ll respond and what we’ve learned.” “Live our values,” he writes. “This is what distinguishes us from our enemies.”⁴²

As was the case when he was in command of US and coalition forces in Iraq, General Petraeus has long understood that there is no purely military solution to the conflict in Afghanistan, and that success on the information side is crucial to a political resolution. One hopes that this does not prove to be a mission impossible in Afghanistan.⁴³

Before turning away from drones to other examples of unmanned systems and unmanned vehicles, it should be noted that on August 3, 2010, the American Civil Liberties Union and the Center for Constitutional Rights filed a suit in a US district court seeking declaratory and injunctive relief against alleged improper US governmental interference with the right of legal representation.⁴⁴ According to the complaint, the plaintiffs were retained by Nasser Al-Aulaqi to provide legal representation in connection with the government’s reported decision to add his son, US citizen Anwar Al-Aulaqi, to its list of suspected terrorists approved for targeted killings. Regulations of the Office of Foreign Assets Control (OFAC) make it illegal for attorneys to provide legal services to any individual whose assets have been blocked on the basis of his being a terrorist without a license from OFAC. In the absence of such a license it would be a criminal offense under OFAC regulations for the plaintiffs to file a lawsuit on Anwar Al-Aulaqi’s father’s behalf seeking to protect the constitutional rights of his US citizen son.

On July 23, 2010, the plaintiffs submitted to OFAC an application to provide “uncompensated legal representation to Nasser al-Aulaqi as representative of the interests of his son, Anwar al-Aulaqi, who remains in hiding” in Yemen.⁴⁵ OFAC refused to grant the requested license. The plaintiffs contend, among other things, that they have a First Amendment right to represent clients in litigation consistent with their organizational missions.

Elsewhere in their complaint the plaintiffs make it clear that they wish to “represent Nasser al-Aulaqi in connection with the government’s reported decision to add his son to its list of suspected terrorists approved for targeted killings”⁴⁶ and plan to file a lawsuit to block the government’s plan.

On August 30, 2010, the American Civil Liberties Union and the Center for Constitutional Rights filed a lawsuit in the United States District Court for the District of Columbia on behalf of Nasser Al-Aulaqi, on his own behalf, and as “Next

Friend” of his son Anwar Al-Aulaqi seeking declaratory and injunctive relief against the US government.⁴⁷ In particular, the plaintiff sought a declaration from the court that the US Constitution and international law prohibit the government from

carrying out targeted killings outside of armed conflict except as a last resort to protect against concrete, specific and imminent threats of death or serious physical injury; and an injunction prohibiting the targeted killing of US citizen Anwar Al-Aulaqi outside this narrow context. Plaintiff also sought an injunction requiring the government to disclose the standards under which it determines whether US citizens can be targeted for death.⁴⁸

The American Civil Liberties Union and the Center for Constitutional Rights were able to file this lawsuit on Mr. Al-Aulaqi’s behalf because the Treasury Department, reversing its earlier position, granted them a license to do so. The lawsuit challenging the Treasury’s regulations is, at this writing, still pending.⁴⁹

On December 7, 2010, the District Court for the District of Columbia dismissed Nasser Al-Aulaqi’s suit in an eighty-three-page opinion on the ground of lack of jurisdiction.⁵⁰ The court ruled that the plaintiff did not have standing to bring the suit and that the political question doctrine barred the court from considering the merits of the plaintiff’s suit.

Other Unmanned Systems/Unmanned Vehicles: The Rise of Robotics

Most, some would say too much, of the present focus on the changing character of weapon systems has been on drones. It is arguable that drones are the tip of the iceberg and that in the not too distant future they will be replaced by new technological marvels created by the rising science of robotics. Because of the exponential growth of robots and their use in armed conflict, the line between science and science fiction has become ever more blurred.

Although drones are unmanned aerial vehicles, or UAVs, it is noteworthy that they are controlled by human operators, many of them located in Nevada—or at least normally they are controlled. As noted previously, one of the documents released by WikiLeaks reported that communications were lost with a Reaper drone, armed with Hellfire missiles and 500-pound bombs, in Afghanistan and it was necessary to order an F-15 fighter aircraft to shoot it down to prevent it from crossing into Tajikistan.⁵¹ There are other examples of military technology running amok.

For example, in his groundbreaking book, *Wired for War*, P.W. Singer describes the following incident:

Just before nine in the morning on October 12, 2007, the 10th Anti-Aircraft Regiment began its role in the South African military's annual Seboka training exercise. The operation involved some five-thousand troops from seventeen other units, so the pressure was on to get everything right. But the unit's automated MK5 antiaircraft system, sporting two 35 mm cannons linked up to a computer, appeared to jam. As a follow-up report recounts, this apparently "caused a 'runaway.'" The description of what happened next is chilling. "There was nowhere to hide. The rogue gun began firing wildly, spraying high-explosive shells at a rate of 550 a minute, swinging around through 360 degrees like a high-pressure hose."

The young female officer in charge rushed forward to try to shut down the robotic gun, but, continues the report, "she couldn't, because the computer gremlin had taken over." The automated gun shot her and she collapsed to the ground. The gun's auto-loading magazines held five hundred high-explosive rounds. By the time they were emptied, nine soldiers were dead (including the officer) and fourteen seriously injured, all because of what was later called a "software glitch."⁵²

As Singer's tour de force makes clear, robots are now operating in the air, on land, and in and under the sea. An early, and crucially important, use of robots on land was as part of an explosive ordnance disposal (EOD) team that was responsible for disarming and disposing of IEDs. The robots involved in this exercise are called PackBots. They have proven to be very efficient at their jobs, and as a team's commander quoted by Singer reportedly put it, "when a robot dies, you don't have to write a letter to his mother."⁵³

The use of robots has increased exponentially. For example, in Iraq in 2003, when the US and coalition forces invaded, there were no robotic units on the ground. By the end of 2005, they numbered 2,400, and by 2008, they were estimated to reach 12,000.⁵⁴ Initially, they were used for non-killing purposes, such as disabling or destroying IEDs or for surveillance, but increasingly, like the aerial drones, they have been used to kill enemies and destroy enemy property.

For example, the TALON is a robot used in Iraq as part of an EOD team. But its manufacturer, Foster-Miller Inc., remodeled the TALON into a "killer app," the Special Weapons Observation Reconnaissance Detection System, or SWORDS. The new design allows soldiers to mount various weapons on the robot, including "an M-16 rifle, a machine gun, and a grenade or rocket launcher." Another example is the MARCBOT (Multi-Function Agile Remote-Controlled Robot). According to Singer:

One of the smallest but most commonly used robots in Iraq, the MARCBOT looks like a toy truck with a video camera mounted on a tiny, antenna-like mast. Costing only \$5,000, this miniscule bot is used to scout for enemies and to search under cars for

hidden explosives. The MARCBOT isn't just notable for its small size; it was the first ground robot to draw blood in Iraq. One unit of U.S. soldiers jury-rigged their MARCBOTs to carry Claymore anti-personnel mines. If they thought an insurgent was hiding in an alley, they would send a MARCBOT down first and, if they found someone waiting in ambush, take him out with the Claymore.⁵⁵

As Singer makes exhaustively clear, there are numerous kinds of military robots in use, including those with the capacity to kill, on land, in the air, and on or under the sea.⁵⁶ It is clear, moreover, that their numbers will continue to increase. As Singer notes,

[a]t a congressional hearing on February 8, 2000, it finally all came together for military robotics on the "demand" side. Senator John Warner from Virginia, the powerful chairman of the Senate Armed Services Committee, laid down a gauntlet, mandating into the Pentagon's budget that by 2010, one-third of all the aircraft designed to attack behind enemy lines be unmanned, and that by 2015, one-third of all ground combat vehicles be driverless.⁵⁷

After the Al-Qaeda terrorist attack on September 11, 2001, according to Singer, one robotics executive was told by his Pentagon buyers that his company should "make 'em [robots] as fast as you can."⁵⁸

For purposes of legal analysis of the legal issues these robots currently or might in the future raise, Darren Stewart has usefully broken them down into two categories: automated and autonomous.⁵⁹ "Automated" has been defined thus: "[a] society is automated when its production is dominated by machines to the extent that machines are given priority over men in the performance of human tasks."⁶⁰ This clearly is the situation envisaged by Senator Warner's mandate to the Pentagon of 2000. "Autonomous" is defined as "self-governing, independent."⁶¹

The crucial difference between the two categories of robots would seem to be that the automated robots are, at least theoretically, fully under the control of a human being, or to use the military term, there is a "human in the loop." By contrast, autonomous robots are independent of human control and, some would argue, because of artificial intelligence have become more intelligent, more capable than humans and, as a result, are better positioned to make crucial life-and-death decisions in war.⁶²

The problem, as noted by Stewart, is that at present there are no autonomous weapon systems in use, with the exception of one South Korean system used in the demilitarized zone separating the two Koreas.⁶³ Hence, only the automated robots currently raise issues of the legality of their use. For their part, possible legal issues involving the use of autonomous robots are currently a matter of pure speculation.

By definition, automated robots have a human in the loop who has the ultimate responsibility for what the automated robot does. The human in the loop would therefore have the responsibility to ensure that in selecting its targets a military killing robot adhered to the principles of the law of armed conflict, including military necessity, proportionality and distinction, and would suffer the consequences of a failure on the part of the robot to do so. It is important to note decisions to shoot cannot be delegated to a computer.

Perhaps the most tragic example of a failure to rely on human judgment, rather than that of a computer, was the July 3, 1988 incident involving a patrol mission of the *USS Vincennes* in the Persian Gulf. On that day the radar system of the *Vincennes*, called Aegis, spotted Iran Air Flight 655, an Airbus passenger jet, flying on a consistent course and speed and broadcasting a radar and radio signal that showed it to be a civilian aircraft. The automated radar system of the *Vincennes*, however, had been designed for use against attacking Soviet bombers in the open ocean of the North Atlantic, not for dealing with skies crowded with civilian aircraft like those over the Gulf. The computer system assigned the plane an icon that on the screen made it appear to be an Iranian F-14 fighter. Singer recounts the tragic denouement of this incident:

Though the hard data were telling the human crew that the plane wasn't a fighter jet, they trusted the computer more. Aegis was in semi-automatic mode, giving it the least amount of autonomy, but not one of the 18 sailors and officers in the command crew challenged the computer's wisdom. They authorized it to fire. (That they even had the authority to do so without seeking permission from more senior officers in the fleet, as their counterparts on any other ship would have had to do, was itself a product of the fact that the Navy had greater confidence in Aegis than in a human-crewed ship without it.) Only after the fact did the crew members realize that they had accidentally shot down an airliner, killing all 290 passengers and crew, including 66 children.⁶⁴

As Yoram Dinstein notes, civilian airliners carrying civilian passengers are "singled out for special protection."⁶⁵ He cites the *Vincennes* incident, however, as an example of the reality that "the speed of modern electronics often creates grave problems of erroneous identification."⁶⁶ Singer adds, quoting retired Army colonel Thomas Adams, that the coming weapons "will be too fast, too small, too numerous, and will create an environment too complex for humans to direct."⁶⁷

If the "coming weapons" will be too complex for humans to direct, someone, or, more precisely perhaps, something, will have to take over the job. Here we enter into the murky world of artificial intelligence, or AI. And here also we move from automated robotics to autonomous robotics.

It is, however, debatable, to say the least, whether artificial intelligence will ever progress to the point where robots will be in a position to apply, on their own, such vital principles of armed conflict as military necessity, proportionality and distinction. The argument against artificial intelligence ever progressing to this point is based, at least in part, on the reality that robots lack the moral sense that humans possess, the capacity to make an empathic response, and in general the ability to draw on their humanity.

In his book, Singer quotes a senior military analyst at Human Rights Watch, a leading human rights non-governmental organization, to illustrate the problems that would be caused by the complete absence of a human element in the targeted killing environment:

“You can’t just download international law into a computer. The situations are complicated; it goes beyond black-and-white decisions.” He explains how figuring out legitimate military targets is getting more difficult in war, especially as conflict actors increasingly fight in the midst of civilian areas like cities and even use civilians for cover. Citing examples he dealt with in his own career, he asks, if a tank is parked inside a schoolyard, is it legitimate to strike? How about if it is driving out of the village and a group of children catch a ride on top?⁶⁸

There is also the tricky issue of accountability for war crimes. As Dinstein notes in his treatise, “War crimes, like all other international crimes, have two constituent elements: (a) the criminal act (*actus reus*) and (b) a criminal intent or at least a criminal consciousness (*mens rea*).”⁶⁹ But a robot has no capacity for either a criminal intent or a criminal consciousness. Moreover, as a practical matter, it would make no sense to apply criminal penalties to robots. Accordingly, even if the day may come when it will be possible to have fully autonomous robots, it will still be necessary to have a human in the loop, at least in a position of command responsibility. In other words, the robots would not be totally autonomous but subject to the commands of a human commander. As Dinstein has instructed:

A commander bears criminal responsibility not only for orders that he issues to his subordinates to commit war crimes. He is answerable for his acts of omission as much as for his acts of commission. These acts of omission relate to failure of proper supervision and control by a commander, designed to ensure that his subordinates do not perpetrate war crimes on their own initiative. Of course, the same commander may be individually accountable twice: once for having given orders to his subordinates to commit certain war crimes, and additionally for knowingly allowing them to commit other war crimes which go beyond those orders.⁷⁰

To be sure, a commander would not be responsible for a robot deciding on its own to commit a violation of the law of armed conflict, unless he or she was aware that such violations were taking place and was in a position to take steps to exercise the necessary effective command and control to prevent or at least bring to a halt such violations. If the robot's actions were caused by a design defect, the remedy might be a civil action in tort against the manufacturer of the robot or perhaps the software engineer involved in the manufacturing process rather than a criminal proceeding.⁷¹

II. Challenges Posed by the Use of Force in Cyberspace

One challenge posed by the use of force in cyberspace may be similar to a primary issue arising out of the so-called war on terror: what is the appropriate legal regime to apply, criminal law and procedure or the law of armed conflict?⁷² In an essay, "Computer Network Attacks by Terrorists: Some Legal Dimensions," published in 2002, I suggested that "the applicable legal regime becomes international criminal law rather than provisions of the UN Charter governing the use of force and the maintenance of international peace and security."⁷³ My conclusion at that time, however, was premised on the assumption that the use of force in cyberspace did not involve State sponsorship of the terrorist attack or any other kind of State involvement in the attack. Recent developments call into question the validity of this assumption.

To be sure, another conclusion I reached in my 2002 essay remains true today: the majority of computer network attacks "may cause disruption of vital systems leading to widespread inconvenience, possibly to some degree of public alarm, but . . . do not directly threaten life."⁷⁴ But recent computer network attacks have been very disruptive indeed. For example, Google, the world's largest Internet search engine, announced in January 2010 that it had been targeted by hackers in 2009, and that the attacks resulted in breaches of its security infrastructure and theft of Google's intellectual property and other data.⁷⁵ What made this attack especially disturbing for the US government was that Google traced the attacks to hackers operating out of China.⁷⁶ Many have insinuated that the Chinese government participated in the attacks, especially because the attacks included the hacking of e-mail accounts belonging to Tibetan human rights activists and journalists,⁷⁷ but there is no conclusive evidence of the Chinese government's involvement in the attacks.

China is not the only traditional economic and military adversary of the United States that has been linked to cyber attacks in recent years. Hackers located in Russia carried out an attack on several of Estonia's government websites in 2007, prompting many to conclude that the Russian government was either formally or

informally behind the attacks.⁷⁸ The attacks came in successive waves, first compromising the Estonian government sites, then infiltrating newspapers, television stations, schools and banks within the country.⁷⁹ The Russian government denied any involvement in the cyber disruptions, but the timing was very suspicious because the attacks occurred the same day that Estonia removed a Soviet-era war monument from the center of its capital city, Tallinn, a controversial move that was preceded by months of diplomatic tensions between the two countries and caused protestors in Moscow to stage several protests.⁸⁰ The Russian government was again implicated in computer attacks in 2008 when Georgia's Internet infrastructure was barraged with "denial of service" attacks that crippled many of its main governmental websites.⁸¹ As the timing of the cyber attacks coincided exactly with Russia's military incursion into Georgia, the Georgia government accused Russia of carrying out the cyber attacks in coordination with its physical military operations.⁸²

In addition to US businesses, vital US national defense agencies have been attacked in recent years.⁸³ For example, the Department of Defense was the target of computer network attacks in 1998, 2003 and 2007, when classified information was stolen.⁸⁴ The perpetrators of these attacks were deemed "unknown foreign intruders," but many commentators suggested the presence of Chinese or Russian footprints, especially since these types of attacks on US national defense systems are thought to be possible only through foreign State participation.⁸⁵

It is, however, difficult to respond to cyber attacks when it is uncertain who or what has engaged in the attack. Hence, the current emphasis appears to be on bolstering US cyber security and protecting US infrastructure from intrusions from criminal hackers, State actors and terrorists. For example, President Barack Obama is continuing to implement the Comprehensive National Cybersecurity Initiative that was created by the George W. Bush administration.⁸⁶ This program is intended to unify the efforts of various government agencies to protect commercial and governmental cyber security, and increase our preparedness for potential attacks. Goals for this initiative include building an international framework to address computer network attacks and the creation of an identity management strategy that would balance the privacy and security interests of individual Internet users.

Despite these efforts, current evidence indicates that the United States is not up to the task of preventing or mitigating the damage of a large-scale computer network attack. In early 2010 the Pentagon conducted a simulated computer attack aimed at paralyzing the country's power grids, communications systems and financial networks to see how the government might respond; the results were not encouraging.⁸⁷ According to military officers who participated in the simulation,

the “enemy had all the advantages: stealth, anonymity and unpredictability.”⁸⁸ No one could pinpoint which country the attack originated from, thus eliminating the possibility of any retaliatory action, and the legal authorization to respond to the attack was unclear because no one could determine “if the attack was an act of vandalism, an attempt at commercial theft, or a State-sponsored effort to cripple the United States, perhaps as a prelude to a conventional war.”⁸⁹

If, and this is a big if, it proves possible to prove that the cyber attack was State-sponsored, the issue of whether it constituted an “armed attack” within the meaning of Article 51 of the UN Charter may arise and, even if it amounts to an armed attack, the kind of response that would meet the criteria of necessity and proportionality could be difficult to determine. Presumably, if the attack resulted in bringing down power stations, refineries, banks and air traffic control systems with resultant loss of life and property, this would constitute an armed attack, but absent such destructive effect, the case is less clear. In his article in this volume, Michael Schmitt has pointed out that in the cyber attack on Georgia there was no loss of life or property.⁹⁰

As the *Economist* has recently noted, “there are few, if any, rules in cyberspace of the kind that govern behavior, even warfare, in other domains.”⁹¹ To remedy this lacuna, the *Economist* suggests that States start talking about arms control on the Internet. Talks have already begun, but it is not clear how successful they will be. In another forum I have tried to identify some of the dimensions of the problem:

In the introduction to this study, it is suggested that the rapidity of change in modern life creates great instability and even chaos in some situations. The rapidity of change is particularly pronounced in the technological and scientific arenas whose considerable complexity makes it difficult for the slow-moving treaty process to adapt. A recent example of this problem is the dispute between the United States and Russia over how to counter cyberwar attacks that could wreak havoc on computer systems and the Internet. Russia favors an international treaty along the lines of those negotiated for chemical weapons and has pushed hard for that approach. The United States, however, argues that a treaty is unnecessary and instead advocates improved cooperation among international law enforcement groups. In the U.S. view, if these groups cooperate to make cyberspace more secure against criminal intrusions, this will also make cyberspace more secure against military campaigns. Trying to reach common ground over an approach is complicated, given that a significant proportion of the attacks against American targets are coming from China and Russia. Also, Russian calls for broader international oversight of the Internet have met strong U.S. resistance to agreements that would allow governments to censor the Internet because they would provide cover for totalitarian regimes. The United States argues further that a treaty would be ineffective because it can be impossible to determine if an Internet attack originated from a government, a hacker loyal to that government, or a rogue acting independently. The unique challenge of cyberspace is that governments can carry out

deceptive attacks to which they cannot be linked. After computer attacks in Estonia in April 2007 and in the nation of Georgia in August 2008, the Russian government denied involvement and independent observers said the attacks could have been carried out by nationalist sympathizers or by criminal gangs. Although the United States and Russia have failed to reach agreement on the proper approach to counter cyberwar attacks, arms control experts say that major governments are reaching a point of no return in heading off a cyberwar arms race.⁹²

The United States and Russia have been talking about the possibility of entering into a bilateral agreement. Even if they are able to overcome the obstacles to reaching agreement between them, it is highly unlikely it would prove possible to conclude a global agreement. This is because since the early 1990s it has proven almost impossible to get agreement among the now almost two hundred member States of the world community on global treaties to deal with the severest problems facing humanity, such as climate change, nuclear proliferation, terrorism, pandemics, trade protectionism and many more.⁹³ Perhaps reflecting an awareness of this difficulty, the *Economist* has suggested “more modest accords, or even just informal ‘rules of the road’ that would raise the political cost of cyber-attacks.” Examples might include

a deal to prevent the crude “denial-of-service” assaults that brought down Estonian and Georgian websites with a mass of bogus requests for information; NATO and the European Union could make it clear that attacks in cyberspace, as in the real world, will provoke a response; the UN or signatories of the Geneva Conventions could declare that cyber-attacks on civilian facilities are, like physical attacks with bomb and bullet, out of bounds in war⁹⁴

Whether these or other more “modest” steps would be effective or lead to formal, “legal” arrangements to establish an arms control regime for cyberspace is debatable.

Moreover, it is important to recognize that although terrorist groups such as Al-Qaeda are not thought to possess enough technological capability at present (without State support) to carry out a major cyber attack that would result in loss of life and property, it is envisioned that within the next decade they could pose such a threat.⁹⁵ Al-Qaeda and its ilk, of course, will not recognize the legitimacy of either modest, informal or formal legal arrangements to establish an arms control regime for cyberspace. They also will enjoy certain advantages because of the asymmetric nature of armed conflict in cyberspace. They will be able to launch a cyber attack from any place they may be located while disguising their location through various computer moves. Applying the principles of military necessity, proportionality and distinction against terrorist cyber attacks will be especially

challenging since the terrorists may be even more heavily embedded in the civilian population than usual when launching attacks. William J. Lynn III, US Deputy Secretary of Defense, recently pointed out some of the advantages enemies of the United States enjoy in asymmetric cyber warfare:

The low cost of computing devices means that U.S. adversaries do not have to build expensive weapons, such as stealth fighters or aircraft carriers, to pose a significant threat to U.S. military capabilities. A dozen determined computer programmers can, if they find a vulnerability to exploit, threaten the United States' global logistics network, steal its operational plans, blind its intelligence capabilities, or hinder its ability to deliver weapons on target. Knowing this, many militaries are developing offensive capabilities in cyberspace, and more than 100 foreign intelligence organizations are trying to break into U.S. networks. Some governments already have the capacity to disrupt elements of the U.S. information infrastructure.

In cyberspace, the offense has the upper hand. The Internet was designed to be collaborative and rapidly expandable and to have low barriers to technological innovation; security and identity management were lower priorities. For these structural reasons, the U.S. government's ability to defend its networks always lags behind its adversaries' ability to exploit U.S. networks' weaknesses. Adept programmers will find vulnerabilities and overcome security measures put in place to prevent intrusions. In an offense-dominant environment, a fortress mentality will not work. The United States cannot retreat behind a Maginot Line of firewalls or it will risk being overrun. Cyberwarfare is like maneuver warfare, in that speed and agility matter most. To stay ahead of its pursuers, the United States must constantly adjust and improve its defenses.⁹⁶

Later in his essay Lynn notes that it will be necessary to adopt a new approach to deterrence, expresses doubts about the feasibility of traditional arms control regimes, and suggests the need for a new approach to international behavior in cyberspace:

Given these circumstances, deterrence will necessarily be based more on denying any benefit to attackers than on imposing costs through retaliation. The challenge is to make the defenses effective enough to deny an adversary the benefit of an attack despite the strength of offensive tools in cyberspace. (Traditional arms regimes would likely fail to deter cyberattacks because of the challenges of attribution, which make verification of compliance almost impossible. If there are to be international norms of behavior in cyberspace, they may have to follow a different model, such as that of public health or law enforcement.)⁹⁷

In short the legal and technological challenges the United States faces in responding effectively to the asymmetric nature of cyber warfare are daunting, and success is not assured. Meeting these challenges is especially difficult when US

forces are forced to adopt a purely defensive posture. In traditional armed conflict, it is the offensive power of the US military that affords it such a marked advantage. As the various panels at the conference demonstrated, however, in asymmetric warfare the United States, more often than not, finds itself on the defensive. The next, and concluding, section of this article considers a few more dimensions of the asymmetry problem and the impact they have on the chances of US forces succeeding in their mission.

III. The Multifaceted Nature of Asymmetric Warfare

As Professor Wolff Heintschel von Heinegg points out,⁹⁸ one of a number of possible definitions of asymmetric warfare is that it is warfare where one of the parties to the armed conflict tries to compensate for its perceived disadvantages vis-à-vis the other party or parties by adopting methods and strategies that are clear violations of the law of armed conflict, e.g., perfidy, suicide bombings and the use of human shields, especially civilians. What is particularly disturbing about asymmetric warfare is that violators of the law of armed conflict gain considerable military advantage in many instances by the adoption of such tactics because they can be extremely effective in countering the normally vastly superior military capabilities of the other party.

Both in Iraq and in Afghanistan the enemy consists of insurgents who embed themselves into the civilian populations, a clear violation of the law of armed conflict. In Iraq a standard tactic of the insurgents was to use children as human shields in firefights with US and coalition forces. In Afghanistan, as noted earlier in this article, there have been sharp factual disputes between NATO and local residents over whether NATO air raids have resulted in civilian deaths, as alleged by the local residents, or, as contended by NATO, in the deaths of insurgents who had opened fire on NATO forces before they were killed.⁹⁹ Regardless of which side is correct in this debate, the result has been a substantial reduction in the number of airstrikes.

General Charles Dunlap, a retired US Air Force judge advocate, regards the decision in Afghanistan to sharply reduce the number of airstrikes as a serious mistake. He contends that "it is often overlooked that during the surge [in Iraq], thousands of insurgents were captured or killed by American special operation forces and airstrikes. I do believe, firmly, that the much-derided killing and capturing actually was the key to success."¹⁰⁰ In support of his argument Dunlap adds that during the Iraq surge, airstrikes increased to five times previous levels.

US military officers in Afghanistan counter these arguments by claiming that special operations raids in 2010 resulted in the deaths of hundreds of militant leaders, while the restrictions on airpower saved Afghan lives and improved

relations with the government. Others argue that the Iraqis themselves were responsible for the reduction of violence: Sunni insurgents who turned against Al-Qaeda, and Shiite militias who embraced a ceasefire with the Sunni.¹⁰¹ For his part, James Dubik, a retired lieutenant general who oversaw the training of the Iraqi military during the surge, reportedly stated: “The decisiveness of the surge came from an aggregate of factors—more like a thunderstorm than a single cause and effect.”¹⁰² He believes that General Petraeus will look for the same aggregate effect in Afghanistan.

In both Iraq and Afghanistan, however, as well as more generally in the worldwide conflict (no longer “war”) with Al-Qaeda and affiliated terrorist groups, the struggle for “hearts and minds” or, if one prefers, the “propaganda war” is of crucial importance. And as indicated earlier in this article, it appears that the enemy has been able to counter the advantages that the United States and its allies would normally enjoy. Perhaps the most recent example of this is the apparent impact of the current debate in the United States over whether a mosque should be permitted to be built in the vicinity of where the Twin Towers were destroyed on 9/11. Some exceedingly inflammatory negative remarks about Islam made by some opponents of building the mosque in that vicinity have reportedly resulted in significant increases in the number of recruits for Al-Qaeda. The First Amendment protects such remarks, but unwittingly they constitute grist for Al-Qaeda’s propaganda mill.

At this writing, the papers are full of still another dispute between NATO and Afghan officials over the results of a NATO airstrike.¹⁰³ According to Afghan officials, the airstrike hit the election convoy of an Afghan parliamentary candidate, wounding him and killing as many as ten campaign aides. But the NATO version is that the strike killed a senior militant leader. US Secretary of Defense Robert Gates, who was visiting Afghanistan at the time, reportedly stated that the airstrike targeted and killed a “very senior official” from the Islamic Movement of Uzbekistan, or IMU, a militant group the United States has designated as a terrorist organization.¹⁰⁴ NATO officials said that the airstrike killed and injured up to twelve insurgents after NATO forces identified several armed men in a sedan that was part of a six-car convoy. Only the sedan was hit, they said.

There seems to be no current mechanism in Afghanistan for resolving these disputes over the results of NATO airstrikes. But there also seems to be little doubt that, regardless of their veracity, frequent reports of attacks resulting in civilian casualties are undermining the counterinsurgency effort, which is aimed at protecting the population and shoring up support for the Afghan government.

Two other factors loom large when one is considering the problem of civilian deaths arising from the armed conflict in Afghanistan. The first, as noted before, is

the difficulty in distinguishing between combatants and civilians in asymmetric warfare. The second, it is important to note, is that the United Nations has reported that 70 percent of civilians who die in violence in Afghanistan are killed by insurgents.¹⁰⁵

Yet it is always the United States and NATO who are on the defensive when claims of civilian casualties are raised. In his concluding remarks at the conference, Yoram Dinstein deplored this constantly defensive posture. As he pointed out, the enemy has successfully engaged in lawfare, the use and abuse of legal argument, to leave the impression that the law of armed conflict demands there be *no* civilian casualties. It does not, of course, and this reality should be aggressively brought home to the people of Afghanistan and elsewhere. It should also be brought home to them that the enemy constantly engages in lawless behavior and, as pointed out by the United Nations, consistently kills its own civilians in armed conflict. Dinstein's call for the United States and its allies to abandon their defensive posture and take the offense to demonstrate, stressing their own efforts to comply with the law of armed conflict, the lawlessness and brutality of Al-Qaeda, the Taliban and their ilk is compelling.¹⁰⁶

The enemies in both Iraq and Afghanistan are insurgents, and the United States and its allies are involved in counterinsurgency in both countries. General Petraeus was in charge of the counterinsurgency in Iraq and has now assumed a similar role in Afghanistan. He was, moreover, the primary architect of the 2006 *U.S. Army/Marine Corps Counterinsurgency Field Manual*.¹⁰⁷ The Manual, regarded as the "bible" of counterinsurgency, raises the crucial issue of the time required for a well-run counterinsurgency strategy to work. Sara Sewall, a former Pentagon official who wrote the introduction to the University of Chicago edition of the manual, for one is skeptical that the US public will be willing to "supply greater concentrations of forces, accept higher casualties, fund serious nation-building and stay many long years to conduct counterinsurgency by the book."¹⁰⁸ In light of current developments, with the withdrawal of all US combat troops from Iraq—amid indications that the Iraqi army and police may not be able to provide adequate security on their own¹⁰⁹—and a plan to start withdrawing combat troops from Afghanistan in the summer of 2011, Sewall's skepticism would appear well justified.

Notes

1. See Raul A. "Pete" Pedrozo, *Use of Unmanned Systems to Combat Terrorism*, which is Chapter IX in this volume, at 217, 218–19.

2. See Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004–2009*, at 8 (Notre Dame Law School Legal Studies Research Paper No. 09-43, 2010), available at <http://ssrn.com/abstract=1501144>.

3. *Id.*

4. See Pedrozo, *supra* note 1, at 240.

5. See Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, Human Rights Council, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf> [hereinafter *Study on Targeted Killings*].

6. For discussion of the distinction between war criminals and unlawful combatants, see YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 266–70 (2d ed. 2010).

7. See *Study on Targeted Killing*, *supra* note 5, ¶ 72.

8. I am indebted to Professor Michael N. Schmitt of Durham University Law School in the United Kingdom for this observation.

9. *Id.*

10. Article 43(2) of Additional Protocol I provides: “Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3.

11. See Matthew Green, *Chilling view of conflict exposed*, FINANCIAL TIMES, July 27, 2010, at 2.

12. *Id.*

13. Richard A. Oppel Jr. & Taimoor Shah, *Afghans Say Attack Killed 52 Civilians; NATO Differs*, NEW YORK TIMES, July 27, 2010, at A4.

14. John F. Murphy, *Afghanistan, Hard Choices and the Future of International Law*, 39 ISRAEL YEARBOOK ON HUMAN RIGHTS 69, 91–92 (2009).

15. Green, *supra* note 11.

16. In response to reports that a NATO attack on July 23, 2010 allegedly killed fifty-two civilians, President Hamid Karzai reportedly condemned the attack as “both morally and humanly unacceptable,” and the Afghan government issued a statement saying “success over terrorism does not come with fighting in Afghan villages, but by targeting its sanctuaries and financial and ideological sources across the borders.” Oppel & Shah, *supra* note 13.

17. PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, *MANUAL ON INTERNATIONAL LAWS APPLICABLE TO AIR AND MISSILE WARFARE* (2009), available at <http://ihlresearch.org/amw/HPCR%20Manual.pdf>.

18. I am indebted to Professor Schmitt for bringing this argument to my attention.

19. DINSTEIN, *supra* note 6, at xiii & 26.

20. *Id.* at 26.

21. *Id.* at 27.

22. *Id.*

23. *Hamdan v. Rumsfeld*, 548 U.S. 557, 630–31 (2006).

24. DINSTEIN, *supra* note 6, at 56.

25. Michael N. Schmitt, *The United States Supreme Court and Detainees in the War on Terror*, 37 ISRAEL YEARBOOK ON HUMAN RIGHTS 33, 68 (2007).

26. See DAVID LUBAN, JULIE R. O’SULLIVAN & DAVID P. STEWART, *INTERNATIONAL AND TRANSNATIONAL CRIMINAL LAW* 1060, 1063 n.2 (2010).

27. Schmitt, *supra* note 25, at 69.

28. *Id.* at 67 n.134.

29. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609.

30. Prosecutor v. Tadic, Case No. IT-94-1-AR72, Interlocutory Appeal on Jurisdiction (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

31. *Id.*, ¶ 70.

32. *Id.*, ¶¶ 67, 70.

33. See Pedrozo, *supra* note 1, at 219–27.

34. Article 51 of the UN Charter provides in pertinent part: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”

35. For discussion of some of these issues, see John F. Murphy, *Force and Arms*, in 1 UNITED NATIONS LEGAL ORDER 247, 257–70 (Oscar Schachter & Christopher C. Joyner eds., 1995).

36. Quoted in J. MOORE, DIGEST OF INTERNATIONAL LAW 412 (1906).

37. It is noteworthy that Yoram Dinstein is of the view that “reliance on that [*Caroline*] incident is misplaced.” YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE 184 (4th ed. 2005). Among the reasons given to support this view is that “[t]here was nothing anticipatory about the British action against the *Caroline* steamboat on US soil, inasmuch as use of the *Caroline* for transporting men and materials across the Niagara River—in support of an anti-British rebellion in Canada—had already been in progress.” *Id.* at 184–85.

38. Quoted in Pedrozo, *supra* note 1, at 242.

39. *Id.* 246–48.

40. See Richard A. Oppel Jr. & Rod Nordland, *Petraeus to Expand Efforts to Protect Afghan Civilians*, NEW YORK TIMES, Aug. 4, 2010, at A10.

41. *Id.*

42. *Id.*

43. On August 4, 2010, the *New York Times* reported that Pakistan’s President, Asif Ali Zardari, was quoted in *Le Monde*, a leading French newspaper, as saying that coalition forces were losing the war in Afghanistan because they had “lost the battle to win hearts and minds” of Afghans, and that the Taliban’s success lay “in knowing how to wait” for NATO forces to withdraw. See John F. Burns, *Afghan War Is Being Lost, Pakistani President Says*, NEW YORK TIMES, Aug. 4, 2010, at A8.

44. American Civil Liberties Union, American Civil Liberties Union Foundation, and Center for Constitutional Rights v. Timothy F. Geithner, Secretary of the Treasury and Adam J. Szubin, Director of the Office of Foreign Asset Control, Complaint for Declaratory and Injunctive Relief, United States District Court for the District of Columbia, Aug. 3, 2010, available at <http://www.aclu.org/files/assets/2-OFACComplaintFinal.pdf>.

45. *Id.* at 3.

46. *Id.* at 9.

47. Nasser Al-Aulaqi v. Barack H. Obama, Leon C. Panetta, and Robert M. Gates, Complaint for Declaratory and Injunctive Relief, No. 10-cv-01469 (D.D.C. Aug. 30, 2010), available at <http://www.aclu.org/national-security/al-aulaqi-v-obama-complaint>.

48. *Id.*, ¶ 6.

49. See Scott Shane, *Rights Groups Sue U.S. on Effort to Kill Cleric*, NEW YORK TIMES, Aug. 31, 2010, at A6.

50. Nasser Al-Aulaqi v. Barack H. Obama, Robert M. Gates, and Leon E. Panetta, 727 F. Supp. 2d 1 (2010).

51. See *supra* text accompanying note 11.
52. P.W. SINGER, WIRED FOR WAR 196 (2009).
53. P.W. Singer, *Robots at War: The New Battlefield*, WILSON QUARTERLY, Winter 2009, at 30, available at <http://www.wilsonquarterly.com/article.cfm?aid=1313>.
54. *Id.*
55. *Id.*
56. See SINGER, *supra* note 52. Between pages 308 and 309, Singer has inserted pictures of, and commentary on, a great variety of robots in many different situations. See also Singer, *supra* note 53, for extensive commentary on the different kinds of robots.
57. SINGER, *supra* note 52, at 59.
58. *Id.*
59. See Darren M. Stewart, *New Technology and the Law of Armed Conflict*, which is Chapter X in this volume, at 271, 273–84.
60. See OXFORD ENGLISH DICTIONARY 320–21 (2d ed. 1989), quoting the November 1962 *Catholic Gazette*.
61. *Id.*
62. See generally Singer, *supra* note 53, who quotes various military officers and defense officials.
63. See Stewart, *supra* note 59, at 281.
64. Singer, *supra* note 53.
65. See DINSTEIN, *supra* note 6, at 117, citing H.B. Robertson, *The Status of Civil Aircraft in Armed Conflict*, 27 ISRAEL YEARBOOK ON HUMAN RIGHTS 113, 126 (1997).
66. *Id.*
67. Singer, *supra* note 53.
68. SINGER, *supra* note 52, at 389, quoting Marc Garlasco of Human Rights Watch.
69. DINSTEIN, *supra* note 6, at 279.
70. *Id.* at 271. As Dinstein notes, *id.* at 276, the most recent international instrument dealing with command responsibility is the Rome Statute of the International Criminal Court, which provides in Article 28:

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

1. A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(a) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(b) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

2. With respect to superior and subordinate relationships not described in paragraph 1, a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates where:

(a) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(b) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(c) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

71. See, on this point, SINGER, *supra* note 52, at 389.

72. For consideration of this issue as it applies to the “new terrorism,” see John F. Murphy, *Challenges of the “New Terrorism,”* in ROUTLEDGE HANDBOOK OF INTERNATIONAL LAW 281, 284 (David Armstrong ed., 2009).

73. John F. Murphy, *Computer Network Attacks by Terrorists: Some Legal Dimensions*, in COMPUTER NETWORK ATTACK AND INTERNATIONAL LAW 323, 327 (Michael N. Schmitt & Brian T. O’Donnell eds., 2002) (Vol. 76, US Naval War College International Law Studies).

74. *Id.*

75. See John Markoff, *Google Asks Spy Agency for Help with Inquiry into Cyberattacks*, NEW YORK TIMES, Feb. 4, 2010, at A6.

76. See Miguel Helft & John Markoff, *In Rebuke of China, Focus Falls on Cyber Security*, NEW YORK TIMES, Jan. 13, 2010, at A1.

77. *Id.*

78. See Steven Lee Myers, ‘E-stonia’ Accuses Russia of Computer Attacks, NYTIMES.COM (May 17, 2007), <http://www.nytimes.com/2007/05/18/world/europe/18cnd-russia.html>.

79. *Id.*

80. *Id.*

81. See John Markoff, *Before the Gunfire, Cyberattacks*, NYTIMES.COM (Aug. 12, 2008), <http://www.nytimes.com/2008/08/13/technology/13cyber.html>.

82. *Id.*

83. See Interview by Terry Gross, National Public Radio, with James Lewis, *Assessing the Threat of Cyberterrorism* (Feb. 10, 2010), transcript available at <http://www.npr.org/templates/transcript/transcript.php?storyId=123531188> [hereinafter Lewis Interview].

84. *Id.*

85. *Id.*

86. See John Markoff, *U.S. to Reveal Rules on Internet Security*, NEW YORK TIMES, Mar. 1, 2010, at A14.

87. See David Sanger, *In Digital Combat, U.S. Finds No Easy Deterrent*, NEW YORK TIMES, Jan. 25, 2010, at A1.

88. *Id.*

89. *Id.*

90. See Michael Schmitt, *Cyber Operations and the Jus in Bello: Key Issues*, which is Chapter V in this volume, at 89, 97.

91. *Cyberwar*, ECONOMIST, July 3, 2010, at 11.

92. JOHN F. MURPHY, *THE EVOLVING DIMENSIONS OF INTERNATIONAL LAW: HARD CHOICES FOR THE WORLD COMMUNITY* 266–67 (2010).

93. See, in this connection, *id.* at 267–68.

94. *Cyberwar*, *supra* note 91, at 11–12.

95. See Lewis Interview, *supra* note 83.

96. William J. Lynn III, *Defending a New Domain*, FOREIGN AFFAIRS, Sept.–Oct. 2010, at 97, 98–99.

97. *Id.* at 99–100.

98. See Wolff Heintschel von Heinegg, *Asymmetric Warfare: How to Respond?*, which is Chapter XVII in this volume, at 463, 470–73.

99. See Alissa J. Rubin, *In Afghanistan, More Attacks on Officials and a Protest Over a Deadly NATO Raid*, NEW YORK TIMES, Aug. 19, 2010, at A6, col. 1.

100. As quoted in Julian E. Barnes, *Battle Centers on Surge*, WALL STREET JOURNAL, Aug. 27, 2010, at A9.

101. *Id.*

102. As quoted in *id.*

103. See Adam B. Ellick & Sangar Rahimi, *Accounts Differ on Strike by NATO in Afghanistan*, NEW YORK TIMES, Sept. 3, 2010, at A6; Maria Abi-Habib, Julian E. Barnes & Habib Totakhil, *Deaths Disputed in Afghan Airstrike*, WALL STREET JOURNAL, Sept. 3, 2010, at A8.

104. See Abi-Habib, Barnes & Totakhil, *supra* note 103.

105. See Ellick & Rahimi, *supra* note 103.

106. See Yoram Dinstein, *Concluding Remarks: LOAC and Attempts to Abuse or Subvert It*, which is Chapter XVIII in this volume, at 483.

107. HEADQUARTERS, DEPARTMENT OF THE ARMY & HEADQUARTERS, MARINE CORPS COMBAT DEVELOPMENT COMMAND, FM 3-24/MCWP 3-33.5, THE U.S. ARMY/MARINE CORPS COUNTERINSURGENCY FIELD MANUAL (University of Chicago Press 2007) (2006).

108. Sarah Sewall, *A Radical Field Manual*, *Introduction to id.* at xxi, xxxviii–xxxix.

109. See Steven Lee Myers & Duraid Adnan, *Attack Shows Lasting Threat to U.S. in Iraq*, NEW YORK TIMES, Sept. 6, 2010, at A1.

PART III

**THE CHANGING CHARACTER OF THE
BATTLEFIELD: THE USE OF FORCE IN
CYBERSPACE**

III

Cyber Attacks as “Force” under UN Charter Article 2(4)

Matthew C. Waxman*

In a 2010 article in *Foreign Affairs*, Deputy Secretary of Defense William Lynn revealed that in 2008 the Department of Defense suffered “the most significant breach of U.S. military computers ever” when a flash drive inserted into a US military laptop surreptitiously introduced malicious software into US Central Command’s classified and unclassified computer systems.¹ Lynn explains that the US government is developing defensive systems to protect military and civilian electronic infrastructure from intrusions and, potentially worse, disruptions and destruction, and it is developing its own cyber-strategy “to defend the United States in the digital age.”²

To what extent is existing international law, including the UN Charter, adequate to regulate cyber attacks and related offensive and defensive activities today and in the future? By “cyber attacks” I mean efforts to alter, disrupt, degrade or destroy computer systems or networks or the information or programs on them.³

This article examines one slice of that legal puzzle: the UN Charter’s prohibitions of the threat or use of “force” contained in Article 2(4).⁴ Other writings in this volume deal with questions such as Article 51’s self-defense provisions and questions of State responsibility, and there are other international legal prohibitions and regulations that are relevant as well. But Article 2(4) is a good place to start

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because it establishes or reflects foundational principles upon which most international law regulating international security sits. As a general matter, military attacks are prohibited by Article 2(4) except in self-defense or when authorized by the UN Security Council. Also as a general matter, most economic and diplomatic assaults or pressure, even if they exact tremendous costs on a target State, are not barred in the same way. Where along the spectrum in between might cyber attacks—which have some attributes of military attacks and some attributes of non-military pressure—lie?

Almost a decade ago, in a previous volume of this series, Professor Yoram Dinstein observed of cyber attacks: “The novelty of a weapon—any weapon—always baffles statesmen and lawyers, many of whom are perplexed by technological innovation. . . . [A]fter a period of gestation, it usually dawns on belligerent parties that there is no insuperable difficulty in applying the general principles of international law to the novel weapon”⁵ This article takes up that claim in examining how US officials, scholars and policy experts have sought to adapt the UN Charter’s basic principles.

This analysis yields two descriptive insights. First, it shows that American thinking (both inside and outside the government) inclines toward reading prohibited “force” broadly enough to include some hostile actions that might be carried out with bits of data in cyberspace. Although not necessarily inconsistent with interpretations previously dominating American thinking, this recent inclination reflects a shift away from the stricter readings of Article 2(4) and related principles that the United States government defended in the past when it was often the United States and its allies resisting efforts by some other States to read “force” broadly or flexibly.

Second, any legal line drawing with respect to force and modes of conflict has distributive effects on power, and it is therefore likely to be shaped by power relations. Because States have different strategic cyber-capabilities and different vulnerabilities to those capabilities, it will be difficult to reach international consensus with regard to the UN Charter’s application to this problem.

Article 2(4) and the Meaning of “Force”

Modern legal regulation of force and conflict begins with the UN Charter, and specifically Article 2(4), which mandates that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”⁶ Article 51 then provides that “[n]othing in the present Charter shall impair the inherent right of individual or

collective self-defense if an armed attack occurs against a Member of the United Nations.”⁷ Although significant debate exists about the scope of self-defensive rights to resort to military force, it is generally agreed that the use of military force authorized under Article 51 is not prohibited under Article 2(4).⁸

With respect to offensive cyber-capabilities and the UN Charter, then, these provisions raise several major questions: In terms of Article 2(4), might a cyber attack constitute a prohibited “use of force”? If so, might a cyber attack give rise to a right to use military force in self-defensive response pursuant to the rights reserved in Article 51?⁹ The latter question is taken up in more detail in another article in this volume, but because the two provisions operate in tandem it is important to bear in mind self-defense remedies here as well.

Global interconnectedness brought about through information technology gives States and non-State actors a powerful potential weapon. Military defense networks can be remotely disabled or degraded. Flooding an Internet site, server or router with data requests to overwhelm its capacity to function—so-called “denial of service” attacks—can be used to take down major information networks, as demonstrated by an attack on Estonia (a country especially reliant on Internet communications) during 2007 diplomatic tensions with Russia.¹⁰ Private-sector networks can be infiltrated, damaged or destroyed.¹¹

Some experts speculate that the United States is at particularly heightened risk because of its tremendous economic and military dependency on networked information technology.¹² As the Obama administration’s 2010 National Security Strategy acknowledged,

[t]he very technologies that empower us to lead and create also empower those who would disrupt and destroy. They enable our military superiority, and . . . [o]ur daily lives and public safety depend on power and electric grids, but potential adversaries could use cyber vulnerabilities to disrupt them on a massive scale.¹³

Such possibility that massive harm could be perpetrated in cyberspace, rather than physical space, raises questions whether the UN Charter’s foundational prohibitions and authorities—which were drafted with conventional warfare in mind—apply or should apply to such conduct.

The dominant view in the United States and among its allies has long been that Article 2(4)’s prohibition of force and the complementary Article 51 right of self-defense apply to military attacks or armed violence.¹⁴ The plain meaning of the text supports this view, as do other structural aspects of the UN Charter. For example, Articles 41 and 42 authorize, respectively, the Security Council to take actions not involving armed force and, only should those measures be inadequate, to escalate

to armed force. There are textual counterarguments, such as that Article 51’s more specific limit to “armed attacks” suggests that drafters envisioned prohibited “force” as a broader category not limited to particular methods, but the discussions of means throughout the document suggests an intention to regulate armed force more strictly than other instruments of power, and this narrow interpretation has generally prevailed.

An alternative view of Article 2(4) looks not at the instrument used but its purpose and general effect: that it prohibits coercion. Kinetic military force is but one instrument of coercion, and often the easiest to observe. At various times some States—usually those of the developing world or, during the Cold War, the “Third World”—have pushed the notion that “force” includes other forms of pressure, such as political and economic coercion that threatens State autonomy.¹⁵ During the Charter’s early years, debates similar to that over Article 2(4)’s definition of “force” also played out in the UN General Assembly over how to define prohibited “aggression.” The United States and its Western allies pushed a narrow definition of “aggression,” focused on military attacks, while developing States advocated an expansive definition to include other forms of coercion or economic pressure.¹⁶ A problem with the latter approach has always been the difficulty of drawing lines between unlawful coercion and lawful pressure, since coercion in a general sense is ever-present in international affairs and a part of everyday inter-State relations.¹⁷

A third possible approach toward interpreting Article 2(4) and related principles focuses on the violation and defense of rights; specifically, that it protects States’ rights to freedom from interference. Such an approach might tie the concept of force to improper meddling or intrusion of the internal affairs of other States, rather than a narrow set of means. Again, during the Charter’s early years it was often the Third World pushing this view, as expressed in UN General Assembly resolutions.¹⁸ Aside from the weak textual support for this approach, pragmatic considerations precluded the much wider interpretation, though this approach brings to mind possible analogies of cyber attacks to other covert efforts to undermine political or economic systems, such as propaganda efforts.

To whatever extent Article 2(4)’s meaning was settled and stable by the end of the Cold War in favor of a narrow focus on military force, cyber warfare poses challenges and tests the Charter’s bounds. Offensive cyber attack capabilities such as taking down government or private computer systems share some similarities with kinetic military force, economic coercion and subversion, yet also have unique characteristics and are evolving rapidly. The possibility of cyber attacks therefore raises difficult line-drawing questions and requires re-examination of previous US legal strategy toward Charter interpretation.

Emergent US Interpretation

The examples of competing interpretations drawn from early legal debates over the UN Charter are useful for two reasons. First, they help show that some fundamental issues involved in current discussions of cyber attacks are not entirely new or unique to cyber-technology. Modes and technologies of conflict change, and the law adjusts with varying degrees of success to deal with them. Second, they highlight some subtle but important realignments of US legal-strategic interests.

The United States government has not articulated publicly a general position on cyber attacks and Articles 2(4) and 51, though no doubt internally the US government's actions are guided by extant legal determinations developed through inter-agency deliberation. There is, in the meantime, considerable momentum among American scholars and experts toward finding that some cyber attacks ought to fall within Article 2(4)'s prohibition on "force" or could constitute an "armed attack," insofar as those terms should be interpreted to cover attacks with features and consequences closely resembling conventional military attacks or kinetic force. The National Research Council convened a committee to study cyber warfare. It concluded that cyber attacks should be judged under the UN Charter and customary *jus ad bellum* principles by considering whether the *effects* of cyber attacks are tantamount to a military attack.¹⁹ Michael Schmitt, in a seminal article on the topic, proposes that whether a cyber attack constitutes force depends on multiple factors that characterize military attacks, including severity, immediacy, directness, invasiveness, measurability and presumptive legitimacy.²⁰ Other legal experts have proposed similar tests emphasizing effects,²¹ and some policy experts have come to similar conclusions in terms of US defensive doctrine against cyber attacks. Richard Clarke, for example, proposes a doctrine of "*cyber equivalency*, in which cyber attacks are to be judged by their effects not their means. They would be judged as if they were kinetic attacks, and may be responded to by kinetic attacks, or other means."²²

Statements by senior US government officials have either hinted that the United States would regard some cyber attacks as prohibited force or declined to rule out that possibility. In 1999, the Defense Department's Office of the General Counsel produced an *Assessment of International Legal Issues in Information Operations*. That report noted:

If we focused on the means used, we might conclude that electronic signals imperceptible to human senses don't closely resemble bombs, bullets or troops. On the other hand, it seems likely that the international community will be more interested in the consequences of a computer network attack than its mechanism.²³

It further suggested that cyber attacks could constitute armed attacks giving rise to the right of military self-defense.²⁴

Recent statements by senior US government officials appear consistent with that view. In a 2010 address, Secretary of State Hillary Clinton declared US intentions to defend its cybersecurity in terms similar to those usually used to discuss military security:

States, terrorists, and those who would act as their proxies must know that the United States will protect our networks. . . . Countries or individuals that engage in cyber attacks should face consequences and international condemnation. In an interconnected world, an attack on one nation’s networks can be an attack on all.²⁵

In testifying before the Senate committee considering his nomination to head the new Pentagon Cyber Command, Lieutenant General Keith Alexander explained that “[t]here is no international consensus on a precise definition of a use of force, in or out of cyberspace. Consequently, individual nations may assert different definitions, and may apply different thresholds for what constitutes a use of force.”²⁶ He went on, however, to suggest that “[i]f the President determines a cyber event does meet the threshold of a use of force/armed attack, he may determine that the activity is of such scope, duration, or intensity that it warrants exercising our right to self-defense and/or the initiation of hostilities as an appropriate response.”²⁷ Implicit here seems to be a notion that “force” is, to some extent, about effects or consequences of hostile actions.

The United States government probably prefers an effects-based or consequences-based interpretation of “force” or “armed attack” with respect to cyber attacks for what it prohibits, as well as for what it does not prohibit. Under such an approach, for example, computer-based espionage, intelligence collection or perhaps even preemptive cyber-operations to disable hostile systems would not constitute prohibited force, because they do not produce direct or indirect destructive consequences analogous to a military attack.²⁸ As former National Security Agency Director Michael Hayden recently remarked, “Without going into great detail, we’re actually pretty good at [cyber-espionage].”²⁹ Hayden’s comment helps illustrate also a reason why it will be difficult for the United States government to develop and articulate clear legal positions on what sorts of actions in cyberspace constitute illicit force: because the key agencies have divergent policy priorities amid a rapidly evolving strategic environment. Some agencies are charged with protecting the integrity of US military capabilities; some are dedicated to intelligence collection, often involving infiltration of foreign computer networks and information systems; some prioritize protecting US civilian infrastructure, including the private sector’s;

and others are focused on transnational law enforcement and enhancing international cooperation. These divergent policy priorities probably make it difficult to agree on how broadly or narrowly to draw legal lines, whether to drive toward legal clarity at all, and whether to engage publicly or diplomatically on these points.

Challenges of Regulating Cyber-“Force”

Even if Article 2(4) is interpreted to prohibit some forms of offensive cyber attacks, it would prove difficult to apply and enforce that prohibition. The difficulties of regulating certain types of conflicts in earlier eras of UN history help demonstrate these challenges.

Lamenting in 1970 the “death” of Article 2(4), Professor Thomas Franck assessed that rapid changes in the way conflict was waged had made its prohibitions of force obsolete. Whereas “[t]he great wars of the past, up to the time of the San Francisco Conference, were generally initiated by organized incursions of large military formations of one state onto the territory of another, incursions usually preceded by mobilization and massing of troops and underscored by formal declarations of war,” Franck observed that “[m]odern warfare . . . has inconveniently by-passed these Queensberry-like practices.”³⁰ Superpowers routinely supported insurgencies, rebel movements and coups against States supporting the other power with various forms of assistance, including arms. Small-scale wars and subversion and counter-subversion waged through local proxies became a common mode of superpower conflict, rather than direct, conventional military action.³¹ The UN Charter regime was ill equipped to handle conflict that unfolded in these ways.

Franck’s concern was that modes of conflict had outstripped the UN Charter regime’s ability to impose costs on purported violators. Indeed, whatever costs Article 2(4) imposed on conventional military attacks across borders may even have pushed antagonists toward other modes of conflict. In another volume of this series dedicated to what was often referred to as “low-intensity conflict,” Alberto Coll remarked in 1995 that “[t]he high political, military, and economic risks increasingly associated through the course of the twentieth century with open, conventional war have led many States and non-State entities to shift to other forms of violence as instruments of foreign policy.”³² Robert Turner agreed, noting that “the low-intensity conflict scenario is selected because it provides a colorable claim of legitimacy (being less obvious).”³³

Questions for conflict in cyberspace then follow: Can Article 2(4)’s constraints adjust to cyber-capabilities in ways that differentiate illicit conduct from legal, and in ways that help impose costs for non-compliance? Can such interpretations command the respect of powerful actors in the international system?

One reason why cyber attacks will be difficult to regulate is that the factual bases for asserting a violation of 2(4)—or a right of armed self-defense under Article 51—will be subject to great uncertainty and difficult to verify. Some technologies or modes of conflict pose special challenges for international legal regulation because their attributes match poorly with the enforcement mechanisms, which sometimes include formal processes like UN Security Council review but more often involve decentralized assessment and evaluation by individual States, international bodies and other influential international actors.³⁴

Those who study the problem of legally regulating cyber attacks usually point to the tricky problem of attribution. That is, it will often be difficult to discern quickly and accurately who launched or directed an attack.³⁵ The nature of electronic informational infrastructure and the limits of forensic capabilities are such that it may be impossible technically to link an attack to the party ultimately responsible.³⁶ As Deputy Secretary Lynn put it, “It is difficult and time consuming to identify an attack’s perpetrator. Whereas a missile comes with a return address, a computer virus generally does not. The forensic work necessary to identify an attacker may take months, if identification is possible at all.”³⁷

Again, though, this is not an entirely new problem for Article 2(4), because similar attribution issues arose in the context of Cold War proxy warfare and low-intensity conflict. “The small-scale and diffuse but significant and frequent new wars of insurgency have,” explained Franck in 1970, “made clear-cut distinctions between aggression and self-defense, which are better adapted to conventional military warfare, exceedingly difficult.”³⁸ Furthermore, “[w]ith the hit-and-run tactics of wars of national liberation, on the other hand, it is often difficult even to establish convincingly, from a pattern of isolated, gradually cumulative events, when or where the first round began, let alone at whose instigation, or who won it.”³⁹ Unconventional warfare and support for insurgencies and counterinsurgencies often by design featured inconclusive evidence of foreign involvement or hostile action, and foreign State antagonists worked to mask, conceal or obscure their participation.⁴⁰ This legal-factual murkiness helps explain why Article 2(4) seemed so impotent in addressing that form of conflict and why that mode of conflict offered an appealing option to the Cold War antagonists: “The covert nature and elusive instrumentalities of unconventional warfare make it difficult for societies under attack to identify the source of the threat and to rally domestic and international opinion.”⁴¹ In other words, once conflict was waged through proxies, it was difficult to develop international consensus about the relevant facts, let alone legal violation or justification.

Like proxy conflicts of the Cold War, but to a much larger extent, cyber-conflict is likely to feature ambiguous or disputed facts about what exactly occurred,

including who committed the electronic intrusion or disruption, and on whose behalf they were doing it.⁴² Consider again the case of Estonia, in which it took months to compile still murky information about the source of attacks on Estonian computer networks, and many key facts—including ultimate responsibility for directing or encouraging them—remain subject to debate.⁴³ Evidence of Russian involvement was mostly circumstantial and Russian officials denied involvement.⁴⁴ There is also evidence suggesting that the Russian government may have encouraged non-government “patriotic hackers” to conduct attacks, and that other countries, like China, may be relying similarly on legions of quasi-private hackers.⁴⁵

The factual haze that plagued efforts to regulate Cold War proxy conflicts will be significantly exacerbated in the cyber-conflict context because of the greater ability of participants to anonymize or mask their identities and because actions in cyber warfare can be so decentralized and dispersed, and often conducted on private infrastructure.⁴⁶ Even if forensic processes can trace a cyber attack to its source, States may be unable to publicize that information in a timely and convincing way, especially when those States are likely to have strong incentive not to discuss the technical details of informational security breaches or reveal their own capabilities to intruders.⁴⁷ These are among the reasons that the National Research Council study concluded that “[w]hile in most conflicts, both sides claim that they are acting in self-defense, cyberconflicts are a particularly messy domain in which to air and judge such claims.”⁴⁸

Like unconventional conflicts of the Cold War but to an even greater degree, cyber warfare may lack clearly discernable starting and end points or easily visible or verifiable actions and countermoves. This does not mean that drawing legal boundaries is impossible. It does suggest, however, that efforts to promote clear international legal prohibitions, or the accretion of interpretive practice commanding broad consensus, will likely be especially protracted and uncertain.

Power Relations and Regulating Cyber Attacks

The early history of and debates about Article 2(4) also illustrate that competing interpretations of the UN Charter have always reflected allocations of power. Those with more power have greater ability to promote through State practice their preferred interpretation. Moreover, efforts to revise the legal rules may have redistributive effects on power, by affecting the costs and benefits of using certain capabilities.

As described above, a fundamental dispute about Article 2(4) has from the beginning concerned the prohibition’s breadth: does Article 2(4) ban military violence only, or does it also ban other forms of coercion, including economic

coercion? Although weak States of the developing world often argued that Article 2(4) prohibited a much broader category of coercion than just military force,⁴⁹ that position never took hold. The more restrictive interpretation generally confined to military means and pushed by the United States largely prevailed.

This interpretation suited the United States well during most of the Charter’s history. The costs it placed on States of resorting first to conventional armed force in a crisis were high, thereby generally helping to preserve territorial stability and prevent escalation. Meanwhile, the United States could build its defenses beneath the umbrella of nuclear deterrence, grow its economy and expand its influence, all the while relatively free to wield its tremendous economic and diplomatic power without the fear of reciprocal coercion.⁵⁰

Against that historical backdrop, a reason that the United States has an interest in regulating cyber attacks but why it will probably be difficult to do so through international law, whether interpreting existing treaties or custom or negotiating new legal agreements, is because the distribution of emerging cyber-capabilities (offensive and defensive) and vulnerabilities (in terms of ability to block actions as well as ability to withstand or tolerate attacks) may not correspond to the previous or present distribution of power composed of older forms of military and economic might.

Indeed, some US strengths rely on informational interconnectedness and infrastructure that is global, mostly private and rapidly evolving, but these strengths are also therefore inextricably linked to emerging vulnerabilities.⁵¹ Although many experts assess that the United States is currently strong relative to others in terms of some offensive capabilities,⁵² several factors make the United States especially vulnerable to cyber attacks, including the extensive interconnectivity of its military and critical infrastructure and its political aversion to heavy regulation of private-sector networks.⁵³

Rapidly evolving cyber-capabilities have the potential to alter power balances among States because some are more vulnerable than others, and attacks could have disproportionately large impacts on some countries or their military capabilities.⁵⁴ Developing an offensive cyber warfare capability is likely to be less costly than competing economically or militarily with much stronger States.⁵⁵ It is therefore not surprising to see some regional rogues or aspirants for power developing offensive cyber warfare capabilities.⁵⁶

As for other major powers, such as Russia and China, they may calculate their strategic interests with respect to cyber warfare and possible legal restrictions on it differently than the United States in light of their own capabilities and vulnerabilities, as well as the degree to which international law constrains their actions.⁵⁷ Russia, for example, has proposed to the United Nations a draft statement of principles

that would prohibit the development of cyber attack capabilities, but in the meantime it is investing in the development of such tools.⁵⁸ Some analysts are therefore skeptical of Russia's sincerity in proposing such agreements, especially given the difficulties of verification in this arena.⁵⁹ China likely sees cyber warfare capabilities as a way of equalizing the conventional military superiority of the United States, and the extent to which public and private lines in China blur may provide China additional advantages in the cyber-conflict realm.⁶⁰

Again, though, consideration of any proposed UN Charter interpretation must account for the processes by which the Charter is interpreted, applied and enforced. The likely factual uncertainty of alleged cyber attacks and the pressures to launch responsive strokes more quickly than those facts can be resolved may require urgent policy decision making amid legal ambiguity. The United States may prefer relatively clear standards with respect to cyber-actions that have immediate destructive effects (at least clear enough to justify military responses or deterrent threats to some scenarios), while at the same time it may prefer some flexibility or permissive vagueness with respect to intelligence collection or some other intrusive measures in cyberspace, so as not to seriously inhibit those activities in which it holds comparative advantages.⁶¹ Other States, however, may see benefits in a different mix of doctrinal line drawing and clarity, in some cases because they are less constrained internally by law than the United States, or because they contemplate using a different mix of cyber-capabilities, or because they see themselves as potential victims (or innocent bystanders) of actions in cyberspace that they would hope to paint legally and diplomatically as impermissible aggression.

In this strategic context, emergent US legal interpretations and declaratory postures may be seen as part of an effort to sustain a legal order that preserves US comparative advantages. In moving toward a view of Article 2(4) that would prohibit some cyber attacks by emphasizing their comparable effects to conventional military attacks, such interpretations help deny that arsenal to others, by raising the costs of its use. At the same time, by casting that prohibition in terms that would in some circumstances help justify resort to military force in self-defense under Article 51, this interpretation lowers the costs to the United States of using or threatening its vast military edge.

That any drawing or redrawing of legal lines creates strategic winners and losers will make it difficult to reach agreement on legal prohibitions, whether through interpretive evolution of the UN Charter or through new legal agreements.⁶² Success therefore depends on the ability of proponents not only to articulate but to defend those legal lines using various forms of influence. That is, the strength of a new legal regime to regulate cyber attacks will, as always, depend to a large extent on the allocation of power that cyber-technological developments are reshaping.

Conclusion

As Professor Michael Reisman reminds us,

[i]nternational law is still largely a decentralized process, in which much lawmaking (particularly for the most innovative matters) is initiated by unilateral claim, whether explicit or behavioral. Claims to change inherited security arrangements . . . ignite a process of counterclaims, responses, replies, and rejoinders until stable expectations of right behavior emerge.⁶³

It is possible, but unlikely, that States will soon come together and clarify through new legal instruments the permissible bounds of actions in cyberspace. More likely is a slow accretion of interpretation as crises unfold and claims and counterclaims, reflecting distributions of power in their content and strength, remold the UN Charter regime's contours around new forms of conflict. A policy upshot of this analysis is that, to be effective, legal strategy must be integrated with cyber warfare strategy, including efforts to promote offensive, defensive, preemptive, deterrent and intelligence capabilities amid a security environment that is evolving rapidly and unpredictably.

Notes

1. See William J. Lynn III, *Defending a New Domain*, FOREIGN AFFAIRS, Sept.–Oct. 2010, at 97.

2. *Id.* at 98.

3. This definition is based on the one used in the National Research Council's Committee on Offensive Information Warfare's TECHNOLOGY, POLICY, LAW, AND ETHICS REGARDING U.S. ACQUISITION AND USE OF CYBERATTACK CAPABILITIES (William A. Owens, Kenneth W. Dam & Herbert S. Lin eds., 2009) [hereinafter NRC COMMITTEE REPORT].

4. Some of the observations and arguments contained in this article are developed further in Matthew C. Waxman, *Cyber-Attacks as "Force": Back to the Future of Article 2(4)*, YALE JOURNAL OF INTERNATIONAL LAW (forthcoming 2011).

5. See Yoram Dinstein, *Computer Network Attacks and Self-Defense*, in COMPUTER NETWORK ATTACK AND INTERNATIONAL LAW 99, 114 (Michael N. Schmitt & Brian T. O'Donnell eds., 2002) (Vol. 76, US Naval War College International Law Studies) [hereinafter CNA AND INTERNATIONAL LAW].

6. U.N. Charter art. 2, para. 4.

7. *Id.*, art. 51.

8. See THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 45–52 (2002).

9. For a survey of approaches to these legal questions, see Daniel B. Silver, *Computer Network Attack as a Use of Force under Article 2(4) of the United Nations Charter*, in CNA AND INTERNATIONAL LAW, *supra* note 5, at 73. There is continuing debate about whether there is a gap between Articles 2(4) and 51, insofar as a use of force prohibited by 2(4) might not be sufficient

to trigger a right to use military force in self-defense. See Albrecht Randelzhofer, *Article 51*, in 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 788, 790 (Bruno Simma et al. eds., 2d ed. 2002).

10. See Evgeny Morozov, *The Fog of Cyberwar*, NEWSWEEK, Apr. 27, 2009, International Edition, World Affairs, at 0; Jonathan Schwartz, *When Computers Attack*, NEW YORK TIMES, June 24, 2007, § WK, at 1.

11. Press Statement, John Chipman, Director-General of the International Institute for Strategic Studies, The Military Balance 2010 (Feb. 3, 2010), <http://www.iiss.org/publications/military-balance/the-military-balance-2010/military-balance-2010-press-statement/>.

12. See NRC COMMITTEE REPORT, *supra* note 3, at 17–20; Walter Gary Sharp Sr., *The Past, Present, and Future of Cybersecurity*, 4 JOURNAL OF NATIONAL SECURITY LAW & POLICY 13 (2010).

13. The White House, National Security Strategy 27 (2010), available at http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.

14. See Tom J. Farer, *Political and Economic Coercion in Contemporary International Law*, 79 AMERICAN JOURNAL OF INTERNATIONAL LAW 405, 408 (1985); NRC COMMITTEE REPORT, *supra* note 3, at 253.

15. See YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 18 (2d ed. 1994); Hans Kelsen, *General International Law and the Law of the United Nations*, in THE UNITED NATIONS: TEN YEARS' LEGAL PROGRESS 1, 5 (Gesina H.J. Van Der Molen et al. eds., 1956); AHMED M. RIFAAT, INTERNATIONAL AGGRESSION: A STUDY OF THE LEGAL CONCEPT 120, 234 (1980); Albrecht Randelzhofer, *Article 2(4)*, in 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 9, at 118.

16. See JULIUS STONE, CONFLICT THROUGH CONSENSUS 87–104 (1977).

17. See Farer, *supra* note 14, at 406.

18. Declaration on the Inadmissibility of Intervention into the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, U.N. GAOR, 20th Sess., Supp. No. 14, at 11, U.N. Doc. A/6014 (Dec. 21, 1965) (“all . . . forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are condemned” and “No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind.”).

19. See NRC COMMITTEE REPORT, *supra* note 3, at 33–34; see also IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 362–63 (1963) (defining “use of force” by looking beyond immediate death or injury from impact to the destructive effects).

20. See Michael N. Schmitt, *Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework*, 37 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 885, 914–15 (1999).

21. See, e.g., Silver, *supra* note 9, at 92.

22. See, e.g., RICHARD A. CLARKE, CYBER WAR 178 (2010) (proposing a doctrine of *cyber equivalency*) (*italics in original*).

23. Reprinted in CNA AND INTERNATIONAL LAW, *supra* note 5, at 459, 483.

24. See *id.*

25. Secretary of State Hillary Rodham Clinton, Remarks on Internet Freedom at the Newseum, Washington, D.C. (Jan. 21, 2010), <http://www.state.gov/secretary/rm/2010/01/135519.htm>.

26. Responses by Lieutenant General Keith Alexander, Nominee for Commander, United States Cyber Command to Senate Armed Services Committee Advance Questions (Apr. 15, 2010), at 11, <http://armed-services.senate.gov/statemnt/2010/04%20April/Alexander%2004-15-10.pdf>.
27. *Id.* at 12.
28. See NRC COMMITTEE REPORT, *supra* note 3, at 259–61.
29. Thomas M. Franck, *Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States*, 64 AMERICAN JOURNAL OF INTERNATIONAL LAW 809, 812 (1970).
30. Quoted in Kim Zetter, *Former NSA Director: Countries Spewing Cyber Attacks Should Be Held Responsible*, WIRED.COM (July 29, 2010), <http://www.wired.com/threatlevel/2010/07/hayden-at-blackhat/>.
31. See Franck, *supra* note 29, at 812–20.
32. Alberto R. Coll, *Unconventional Warfare, Liberal Democracies, and International Order*, in LEGAL AND MORAL CONSTRAINTS ON LOW-INTENSITY CONFLICT 3, 3 (Alberto R. Coll, James S. Ord & Stephen A. Rose eds., 1995) (Vol. 67, US Naval War College International Law Studies).
33. Robert F. Turner, *State Sovereignty, International Law, and the Use of Force in Countering Low-Intensity Aggression in the Modern World*, in *id.* at 43, 60.
34. See Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICHIGAN LAW REVIEW 1620, 1645–46 (1984).
35. See NRC COMMITTEE REPORT, *supra* note 3, at 138–41, 252; Duncan B. Hollis, *Why States Need an International Law for Information Operations*, 11 LEWIS & CLARK LAW REVIEW 1023, 1031–32 (2007); John Markoff et al., *In Digital Combat, U.S. Finds No Easy Deterrent*, NEW YORK TIMES, Jan. 26, 2010, at 1 (discussing difficulties of determining source of cyber attacks).
36. See Jack Goldsmith, *The New Vulnerability*, NEW REPUBLIC, June 24, 2010, at 21, 23.
37. Lynn, *supra* note 1, at 99.
38. FRANCK, *supra* note 8, at 820.
39. *Id.*
40. See Coll, *supra* note 32, at 15–16.
41. See *id.* at 4.
42. See Hollis, *supra* note 35, at 1031–32.
43. See NRC COMMITTEE REPORT, *supra* note 3, at 173.
44. See *id.*
45. See Anne Applebaum, *For Estonia and NATO, a New Kind of War*, WASHINGTON POST, May 22, 2007, at A15; David E. Sanger et al., *U.S. Plans Attack and Defense in Web Warfare*, NEW YORK TIMES, Apr. 28, 2009, at A1.
46. See Sean P. Kanuck, *Information Warfare: New Challenges for Public International Law*, 37 HARVARD INTERNATIONAL LAW JOURNAL 272, 286–88 (1996).
47. The disclosures by Deputy Secretary Lynn described earlier are a case in point, as it took several years for the government to declassify the information, and that decision itself was controversial. See Ellen Nakashima, *Defense Official Discloses Cyberattack*, WASHINGTON POST, Aug. 24, 2010, at A3.
48. See NRC COMMITTEE REPORT, *supra* note 3, at 315.
49. See STONE, *supra* note 16, at 96; Julius Stone, *Hopes and Loopholes in the 1974 Definition of Aggression*, 71 AMERICAN JOURNAL OF INTERNATIONAL LAW 224 (1977).
50. See Tom J. Farer & Christopher C. Joyner, *The United States and the Use of Force*, 1 TRANSNATIONAL LAW & CONTEMPORARY PROBLEMS 15, 22–23 (1991).
51. See PHILIP BOBBITT, *THE SHIELD OF ACHILLES* 792–94 (2002).

52. See Jack Goldsmith, *Can We Stop the Global Cyber Arms Race?*, WASHINGTON POST, Feb. 1, 2010, at A17 (“the U.S. government has perhaps the world’s most powerful and sophisticated offensive cyberattack capability”).

53. See CLARKE, *supra* note 22, at 226–27.

54. See *id.* at 259. For views more skeptical that cyber-capabilities will radically alter power balances, see generally MARTIN C. LIBICKI, *CONQUEST IN CYBERSPACE* (2007); GREGORY J. RATTRAY, *STRATEGIC WARFARE IN CYBERSPACE* (2001).

55. See STEWART BAKER, *SKATING ON STILTS* 218–20 (2010).

56. See Choe Sang-Hun & John Markoff, *Cyberattacks Jam Government and Commercial Web Sites in U.S. and South Korea*, NEW YORK TIMES, July 9, 2009, at A4 (North Korea).

57. For discussion of such legal jockeying among States, see Sean Kanuck, *Sovereign Discourse on Cyber Conflict Under International Law*, 88 TEXAS LAW REVIEW 1571, 1585–87 (2010).

58. See NRC COMMITTEE REPORT, *supra* note 3, at 329–32; John Markoff & Andrew E. Kramer, *U.S. and Russia Differ on Treaty for Cyberspace*, NEW YORK TIMES, June 28, 2009, at A1.

59. See BAKER, *supra* note 55, at 230–31.

60. See NRC COMMITTEE REPORT, *supra* note 3, at 332–33; Office of the Secretary of Defense, *Annual Report to Congress: Military Power of the People’s Republic of China* 27–28 (2009).

61. As a general matter, international law has very little to say about intelligence collection. See Kanuck, *supra* note 46, at 275–76.

62. See Goldsmith, *supra* note 36, at 26.

63. W. Michael Reisman, *Assessing Claims to Revise the Laws of War*, 97 AMERICAN JOURNAL OF INTERNATIONAL LAW 82, 82 (2003).

IV

Low-Intensity Computer Network Attack and Self-Defense

Sean Watts*

I. Introduction

In May 2010, the United States Department of Defense activated the US Cyber Command,¹ consolidating leadership of six previously dispersed military organizations devoted to cyber operations.² To its supporters, Cyber Command represented a significant accomplishment as congressional misgivings over the command's mission, its effects on American citizens' privacy and ambiguous limits on its authority had delayed activation for nearly a year.³

These concerns featured prominently in the confirmation of Lieutenant General Keith Alexander, the President's nominee to lead Cyber Command. In written interrogatories, the Senate Armed Services Committee asked, "Is there a substantial mismatch between the ability of the United States to conduct operations in cyberspace and the level of development of policies governing such operations?"⁴ General Alexander's response identified a gap "between our technical capabilities to conduct operations and the governing laws"⁵ However, he later observed, "Given current operations, there are sufficient law, policy, and authorities to govern DOD cyberspace operations."⁶

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General Alexander's responses often struck such dissonant tones. And while his unclassified responses generally offered little legal reflection, he commented in detail on international self-defense law and cyber operations.⁷ His responses portrayed existing law under the UN Charter as adequate to defend US interests from cyber attack. Further, he indicated the United States would evaluate threats and attacks in the cyber domain exactly as it would in other security realms.⁸ Yet, the same section of responses noted a lack of international legal consensus concerning which cyber events violate the prohibition on the use of force or activate the right of self-defense, suggesting a less than coherent structure to this important international legal regime.⁹

Meanwhile, cyber attacks have rapidly migrated from the realm of tech-savvy doomsayers to the forefront of national security consciousness.¹⁰ One need no longer be an experienced programmer or use much imagination to appreciate the threat posed by cyber attacks. Incidents such as the disruptions experienced in Estonia in 2007 and Georgia in 2008 provide concrete examples of practices, trends and potential harm posed by future cyber events.¹¹

Similarly, cyber conflict theorists paint an increasingly lucid picture of the strategy and tactics that will inspire future attacks and shape defensive efforts. Cyber strategy is evolving rapidly, as threat capabilities and tactics shift to exploit newly discovered vulnerabilities. While defending against massive cyber catastrophes remains a priority for planners, a growing contingent of cyber theorists concludes that campaigns of diffuse, low-intensity attacks offer an increasingly effective strategy for cyber insurgents and State actors alike. Operating below both the focus of defensive schemes and the legal threshold of States' authority to respond with force, low-intensity cyber attacks may prove to be a future attack strategy of choice in cyberspace.

The confluence of Cyber Command's activation with publication of details of recent cyber incidents, as well as insight into emerging cyber strategy, provides an opportunity to critically evaluate General Alexander's assessment of the international law of self-defense as well as the overall significance of the events in Estonia and Georgia. Specifically, it is worthwhile to consider whether the bargain governing use of force reflected in the 1945 UN Charter is adequate for the threats facing States today and for the future of cyberspace. Put differently, will the letter of the Charter's use-of-force regime operate as an effective regulation of States' efforts to secure cyberspace from one another and from non-State threats?

This article argues that the above-mentioned developments in cyber conflict will greatly strain the existing self-defense legal regime and cast past computer network attacks (CNA), such as the Estonian and Georgian incidents, in a new light. First, gaps in the law's response structure will prove highly susceptible to

low-intensity cyber attacks, leaving victim States to choose between enduring damaging intrusions and disruptions or undertaking arguably unlawful unilateral responses. Second, and related, CNA will produce a significantly expanded cast of players, creating a complex and uncontrollable multipolar environment comprising far more States and non-State actors pursuing far more disparate interests than in previous security settings. CNA are unprecedented conflict levelers. CNA technology is inexpensive, easy to acquire and use, and capable of masking identity. CNA permit otherwise weak States and actors to challenge security hegemony at low economic and security cost. Ultimately, these developments will test States' commitment to the collective security arrangement of the Charter and its accompanying restraints on unilateral uses of force to a far greater extent than previously experienced.

Efforts to prevent or defeat massive, debilitating CNA surely warrant attention and resources. However, if such incidents represent aberrations from the majority of cyber hostilities, exclusive legal attention to such catastrophes is surely misplaced. Accounting for and addressing low-intensity CNA are equally—if not more—important to maintaining international order and a place for law in securing cyberspace.

The inquiry begins with a snapshot of the law governing resort to self-defense.

II. Self-Defense under the UN Charter

Legal accounts of self-defense doctrine vary greatly. Debates on preemptive and anticipatory self-defense,¹² collective self-defense,¹³ armed retribution or reprisal,¹⁴ and burdens of proof¹⁵ remain highly contentious and relevant to CNA. At times it seems each examination of these self-defense subtopics generates as many aspects as authors. This section will focus on two distinct but related issues concerning the doctrine of self-defense: first, the relevance of the right of self-defense to interactions with non-State actors and, second, the threshold of “armed attack” which gives rise to the right to exercise self-defense. The unsettled and evolving nature of these issues will prevent a definitive account of either, yet will set the stage for an illustration of how low-intensity CNA may influence the development of each.

Self-Defense against Non-State Actors

The plainest and most widely accepted understanding of the UN Charter portrays self-defense as an exception to the nearly comprehensive ban on the use of force by States.¹⁶ Article 2(4) forbids the threat or use of force by States in their international relations.¹⁷ Meanwhile, Article 51 provides one of two enumerated

exceptions, permitting Member States to take measures in self-defense in response to “armed attack.”¹⁸ The relevance of the self-defense exception to interactions between States is obvious. If Article 2(4) regulates the use of force “in . . . international relations” and Article 51 is intended as a legal exception, then the event that most obviously activates the right is armed attack by other States, the only entities traditionally capable of conducting international relations under the Charter.¹⁹

Less clear, at least as a legal matter, is how, if at all, the self-defense exception applies to “armed attack” by non-State actors. Traditionally, law enforcement models, not directly influenced by the Charter, have guided State responses to non-State actors.²⁰ Yet current international and transnational security environments, shaped by a dramatic rise in the destructive capacity of violent non-State actors,²¹ strongly suggest a role for self-defense beyond interactions between States.²² While as a legal matter the UN Charter security regime is inapposite to State responses to non-State actors without links to State actors, such as attacks launched from *terra nullius* or international waters, such situations seem unlikely or at least exceedingly rare.²³ Far more prevalent are hostile activities by non-State actors based on or launched from UN Member States’ sovereign territories, where the Charter’s use-of-force regime operates clearly in theory if not so clearly in practice. A fractured and incomplete jurisprudence has emerged to cover the issue. Two International Court of Justice (ICJ) opinions address self-defense and non-State actors under the Charter.

Confronted by decades of attacks from outside its territory, Israel, in 2002, began work on a 450-mile barrier comprised alternately of concrete walls, fencing, wire and electronic sensors.²⁴ Encroaching on Palestinian territory, the barrier greatly restricted vehicle and pedestrian traffic. In its filings for the 2004 *Wall* advisory opinion, Israel justified construction of the wall on Palestinian territory as an exercise of self-defense under Article 51.²⁵ The argument was consistent with prior Israeli assertions to the General Assembly that self-defense included “the right of States to use force in self-defence against terrorist attacks.”²⁶

In a split decision, the Court rejected the Israeli claim. The Court asserted Article 51 had “no relevance” to interactions with non-State actors such as Palestine.²⁷ The advisory opinion is nearly summary in this regard, providing no interpretive support, citations to *travaux préparatoires* or examples of State practice. The Court also left unaddressed a point raised in Judge Higgins’s separate opinion that the text of Article 51 does not include any indication “that self-defense is only available when armed attack is made by a State.”²⁸ In his declaration, Judge Buergenthal expressed similar objection to the Court’s opinion. He argued the Court gave inadequate weight to the fact the attacks originated outside Israeli borders, whatever the international legal status of that territory.²⁹

Further criticism of the advisory opinion³⁰ focused on the Court's failure to consider State practice since adoption of the Charter.³¹ States have routinely invoked self-defense doctrine, and Article 51 specifically, to justify the use of force against non-State actors. Several commentators have catalogued States' post-Charter resort to measures in self-defense against non-State actors, including actions taken by the United States, Israel, Portugal, Russia, Ethiopia and South Africa.³² These accounts, and Security Council reactions thereto, paint a portrait of self-defense far more relevant to efforts against hostile non-State actors.³³

The majority of State practice cited in opposition to the *Wall* Court's work showcases measures of self-defense alleging varying degrees of host-State support to the attacking non-State actor. Yet not all purported exercises of self-defense have included such links. In 1976, a series of South African intrusions into the territory of neighboring States to pursue non-State actors were distinct from other exercises in this important respect. South Africa asserted a right of self-defense absent such State involvement.³⁴ The South African government conceded that the States from which rebels operated were not complicit; however, it defended its territorial intrusions as justified in self-defense to continue its pursuit of rebel forces.³⁵ While the Security Council condemned³⁶ South Africa's acts and appeared to denounce the "hot pursuit"³⁷ theory of self-defense, disapproval may be attributable in greater part to the racist policies underlying these measures than to the legality of the theory itself.

Ultimately, the most convincing effort to reconcile the *Wall* Court's account of self-defense with its critics' competing claims emphasizes that the Israeli-Palestinian situation involved no transnational interactions. That is, owing to Palestine's failure to attain statehood, the *Wall* advisory opinion might be read not to reach the issue of valid State responses to non-State actors' armed attacks that originate from another State's territory. One might then plausibly cabin the opinion to situations not involving State actors or their territories, leaving open the issue of exercises of self-defense against non-State actors operating from sovereign territory. Yet the critique persists that a stronger analytical effort by the Court to identify the operative legal framework would have included an exploration of customary norms regulating the exercise of self-defense against purely non-State actors.

Only a year after the *Wall* advisory opinion, the ICJ had an opportunity to revisit and clarify the issue of transnational self-defense against non-State actors. In *Armed Activities on the Territory of the Congo*, Uganda defended its military operations against rebel groups operating from eastern Democratic Republic of the Congo (DRC).³⁸ Uganda offered two justifications for the attacks, both grounded in self-defense. First, it argued that DRC support for anti-Ugandan rebels triggered Uganda's right of self-defense, including the use of force on DRC territory. Second,

and alternatively, Uganda argued that the DRC's inability to control the territory from which anti-Ugandan rebels operated permitted Ugandan measures in self-defense on DRC territory.³⁹ Thus in some respects, the Ugandan claims were not unlike the earlier South African arguments rejected by the Security Council.

Surprisingly, the *Armed Activities* Court did not rule on the lawfulness of Uganda's self-defense against non-State actors. Instead, the Court declined to accept Uganda's characterization of the operations as defensive in nature, noting that the invasion far exceeded in scale and scope what would have been necessary to counter the rebel threat.⁴⁰ Curiously, the Court skipped over the traditional threshold analysis of whether the right to self-defense had been activated, reaching instead the issue of whether the use of force in question constituted a proportionate response. Thus the case left unaddressed the issue of States exercising self-defense in the context of transnational operations against non-State actors.

Once again, the Court attracted criticism for its failure to elaborate on the issue of self-defense against non-State actors.⁴¹ In particular, critics argued the Court should have used the *Armed Activities* case to better explain how self-defense doctrine relates to issues of State responsibility generally. To some members of the Court, the opinion missed an opportunity to clarify the distinct but related standard of State responsibility for non-State actors' conduct within sovereign territory, a matter left uncertain by a prior decision but closely related to the exercise of self-defense.⁴²

In 1986, the Court's *Nicaragua* judgment announced a standard for attributing non-State actors' conduct to States for purposes of self-defense.⁴³ The *Nicaragua* Court ruled that States exerting "effective control" over non-State actors launching armed attacks within or from their territories were subject to lawful measures in self-defense from victim States.⁴⁴ However, the *Nicaragua* effective control standard did not fare well in practice, leaving too much ambiguity to operate as a workable limit on States' exercise of self-defense.⁴⁵ Later, a separate UN-created court, the International Criminal Tribunal for the former Yugoslavia, offered a competing standard for State responsibility.⁴⁶ The *Armed Activities* judgment, however, did little to clarify or adapt the *Nicaragua* standard. The case offers no substantive clarity concerning the level of State support for hostile non-State actors that would give rise to a lawful exercise of self-defense by a victim State.

Critics of the *Armed Activities* decision also point to evidence of States' views on self-defense in response to non-State actors. Many regard the Security Council resolutions and the North Atlantic Treaty Organization (NATO) response to the 9/11 terrorist attacks on the United States as authoritative in this respect.⁴⁷ Unquestionably sufficient in intensity and effect to qualify as armed attacks,⁴⁸ the 9/11 attacks prompted both the Security Council and NATO explicitly to recite Charter-based

self-defense as a lawful response. Condemning the attacks as international terrorism, as well as threats to international peace and security, UN Security Council Resolutions 1368⁴⁹ and 1373⁵⁰ each reaffirmed the United States' right to exercise self-defense. Recalling efforts to muster Security Council support, William Howard Taft IV, then State Department Legal Adviser, recalls, "[We] had no difficulty in establishing that we had a right to use force in self-defense against Al-Qaeda and any government supporting it."⁵¹ With similar dispatch, NATO invoked, for the first time, Article 5 of its organizing treaty with references to collective self-defense, as well as the UN Charter self-defense regime.⁵² The legal effect of invoking Article 5 was to regard 9/11 as an attack upon all NATO member States.⁵³

Clearer political statements in favor of applying self-defense doctrine to attacks by non-State actors are difficult to imagine. Scholars have seized on the 9/11 Security Council resolutions in particular as definitive State support for the exercise of self-defense under the Charter against non-State actors.⁵⁴

Yet the legal import of the 9/11 political responses is debatable.⁵⁵ Security Council resolutions undoubtedly wield legal force. Under the Charter, States are bound to carry out the provisions of resolutions.⁵⁶ However, the extent to which they influence and shape legal doctrine or operate as independent legal precedent is questionable.⁵⁷ On one hand, Security Council voting presents States an opportunity to voice positions concerning resort to self-defense.⁵⁸ Discussion preceding votes on resolutions frequently generates detailed expression of *opinio juris* on issues concerning resort to self-defense.⁵⁹

On the other hand, debate and voting are axiomatically political manifestations, reflecting economic, security and strategic self-interest as much as deliberate and principled legal thought. Use or threat of the veto by permanent members frequently prevents resolutions from reflecting comprehensive, majority State views on legal issues. Further undermining claims to status as law, Security Council practice with respect to self-defense lacks uniformity or regard for precedent. Examining Security Council self-defense practice, Professor Franck identified strong patterns of inconsistency.⁶⁰ Franck observes, "The actual practice of the UN organs has tended to be more calibrated, manifesting a situational ethic rather than doctrinaire consistency either prohibiting or permitting all [self-defense] actions."⁶¹

As promised, the picture of self-defense against non-State actors remains cloudy despite codified law, abundant State rhetoric and significant proliferation in attacks. The ICJ seized neither of two recent opportunities to elaborate on the conditions under which self-defense operates in States' interactions with non-State actors. Nor did the Court on either occasion see fit to account for widely recognized State practice in the area. Thus, a widening rift has become apparent between positive

law and the Court's work on the one hand and State practice on the other. Unfortunately, this ambiguity is not unique to the issue.

The Threshold of "Armed Attack"

The UN Charter identifies "armed attack" as the event which gives rise to Member States' right of self-defense.⁶² Accounts of the Charter's diplomatic conference indicate the term provoked considerable back-channel maneuvering.⁶³ Although still subject to substantial interpretation, the term "armed attack" is thought to offer a comparative advantage over vague customary notions of self-defense. In the words of Professor Stone, "armed attack" at least limits reference to "an observable phenomenon against which [the victim State] reacts."⁶⁴

The prevailing view characterizes armed attacks as a subset of violent acts within a broader grouping of acts that qualify as uses of force.⁶⁵ Though perhaps tempting, drawing precise parallels between the Article 2(4) prohibition on "use of force" and the Article 51 threshold of "armed attack" is flawed.⁶⁶ The modifier "armed" appears intended to eliminate lower levels of force from consideration. Mere coercion does not activate the right of self-defense,⁶⁷ if such activities even qualify as uses of force.⁶⁸ Classically understood, "armed attack" envisions uses of force producing destruction to property or lethal force against persons.⁶⁹ As Professor Stone asserts, the term also ensures a level of definition to prevent aggressors from fraudulently pleading self-defense to excuse offensive operations.⁷⁰ Graphically portrayed, one might imagine a Venn diagram with a large circle encompassing uses of force and a smaller circle within representing armed attacks. Thus, all armed attacks constitute uses of force, whereas not all uses of force rise to the level of armed attack.

Again, the ICJ has weighed in. In the *Nicaragua* case, the Court suggested the threshold of armed attack involved not merely destruction or invasion but also consideration of "scale and effects."⁷¹ In addition to armed invasion by regular forces, the Court observed, "the sending by a State of armed bands to the territory of another State" to conduct similar armed activities would classify as an armed attack.⁷² It is important to note that the Court did not examine instances where such bands carried out activities not involving arms or failing to produce destructive consequences usually associated with armed activity. Rather, the Court distinguished invasions from mere assistance "in the form of the provision of weapons or logistical or other support."⁷³ While conceding that such activities perhaps constituted a threat or use of force, perhaps implicating Article 2(4), the Court concluded routine logistical activities would generally not give rise to the right of self-defense.⁷⁴

The practical significance of the Charter's—and the Court's—distinction between mere uses of force and more extreme armed attacks is a gap in response structure.⁷⁵ The plainest understanding of the distinction concludes that while States may respond to armed attacks with force, including armed measures of self-defense, States may not respond with armed violence or even force to mere uses of force. That is, the Charter's Article 2(4) general prohibition on the use of force by States continues to operate, even against States that have suffered an unlawful threat or use of force. Only armed attack frees a State from the prohibition on the use of force. In this respect, Article 51 operates as an incomplete exception to the prohibition on the use of force. The prevailing view holds that the Charter permits States to respond to mere uses of force only with measures of self-help not themselves rising to a use of force.⁷⁶ Thus the Charter reserves reciprocal uses of force in response to mere violations of Article 2(4) short of armed attack to the Security Council's response regime.⁷⁷

While seemingly a sound textual interpretation, the gap has not aged well. Certainly, removing States' authority to respond with unilateral force to all but the most serious and violent events is in keeping with the spirit and intent of the Dumbarton Oaks drafting conference of 1945. Yet time and events have proved the Security Council unable to respond to many apparent violations of Article 2(4), leaving victims of acts falling within the gap either hostage to the flawed Security Council regime or faced with violating the letter and spirit of the Charter.⁷⁸ The gap proves particularly troubling to States underrepresented, either themselves or by allies, at the Security Council.

The recurring issue of so-called frontier incidents and self-defense illustrates well the contours of the ICJ's struggle to reconcile practice with text. Typically, frontier incidents are small-scale skirmishes of limited duration between States' armed forces. Christine Gray describes frontier incidents as "the most common form of force between States."⁷⁹ The ICJ has endorsed the legal concept of a frontier incident as falling short of "armed attack." In the same passage of the *Nicaragua* case cited above to describe the intensity element of "armed attack," the Court distinguished an armed attack from "a mere frontier incident."⁸⁰ Yet the Court offered almost no elaboration and did not revisit the issue in its factual examination of the parties' respective territorial violations. Critics of the frontier-incident distinction disparage its apparent toleration of "protracted and low-intensity conflict."⁸¹ Still, there are signs that important State actors accept frontier incidents as part of the spectrum of uses of force outside armed attack and thus not giving rise to a broader exercise of self-defense, confirming the Charter's response gap.⁸²

The gap theory is not a universally held view.⁸³ In a separate opinion to the *Oil Platforms* judgment, Judge Simma called the gap theory into question.⁸⁴ He posited

that lawful responses to armed force should generally track the acts that provoke them. While he agreed that only force amounting to armed attack opened the door to full-fledged self-defense, he argued that States are permitted to respond to force short of armed attack with “defensive military action ‘short of’ full-scale self-defence.”⁸⁵ Rather than embrace the gap theory’s all-or-nothing approach to defensive responses to force, Judge Simma advocated a spectrum of proportionality. In some ways like the Court’s approach to the Ugandan operations in *Armed Activities*, Judge Simma would seemingly supplant the Charter’s “armed attack” threshold with a floating scale of proportionality of action in States’ international relations. It seems his standard is satisfied so long as a State’s response to a use of force matches the intensity, scale and duration of the force suffered initially. Interestingly, a passage of the *Nicaragua* case seems to reinforce Judge Simma’s view, supporting proportionate countermeasures in response to uses of force not amounting to armed attack.⁸⁶

A further response to the gap attempts to shrink the conceptual space between the use of force and armed attack by simultaneously raising the threshold of acts qualifying as uses of force under Article 2(4), while lowering the bar for acts qualifying as armed attack under Article 51.⁸⁷ Returning to the previously imagined Venn diagram, this approach would shrink the circle representing use of force while expanding the circle representing armed attack. Such understandings minimize, if not eliminate, the situations in which States are unable to respond to uses of force unilaterally while greatly increasing the realm of situations in which they may employ force in self-defense.

The gap-shrinking effort and Judge Simma’s approach may be useful as efforts to sustain the relevance of the Charter to modern international relations. Casual reviews of State practice seem to support them. Yet gap shrinking surely demands a better explanation of the distinct phrasing of the Charter’s respective articles. And ultimately, in some sense, the gap-shrinking approach appears merely to shift interpretive debate back to the meaning of the term “armed attack.”

In this way, gap shrinking makes no contribution to resolving the persistent ambiguities surrounding “armed attack,” namely the intensity, duration and scope components of the term. And while Judge Simma’s approach appeals to intuitive senses of equity and self-preservation, it is similarly difficult to reconcile with the letter of the Charter’s concessions of sovereignty, no matter their practical flaws. Despite their utilitarian merits, neither approach is particularly satisfying as a matter of textual interpretation, setting up a conflict between principled interpretation and realistic practice in the law of self-defense.

Ultimately, perhaps even committed positivists must entertain a certain amount of sympathy for views that tolerate a broader range of coercive or forceful

responses from State victims of unlawful uses of force. New operational norms, not precisely consistent with the formal security regime of the Charter, may have emerged through subsequent State practice. It has been argued, "The Charter is not a commercial contract but a constitution."⁸⁸ But surely some level of determinism is appropriate, just as it is surely true that the bargain struck by States through the Charter reflected meaningful cessions of sovereignty.

Bearing in mind the contestable legal issues in self-defense, what is happening meanwhile in cyber conflict?

III. The Estonian and Georgian Incidents

Because of the highly classified nature of States' CNA practices and their past infrequency, the earliest legal analyses of CNA resorted to hypothetical or speculative events. Considering how few practical examples these writers had to work with, early forecasts of the operation of self-defense in CNA, if partly speculative, are nonetheless impressive.⁸⁹ Examples of CNA have since proliferated, providing ready grist for the mills of cyber security and cyber law analysts alike. Details of two recent events in particular, the 2007 Estonian and 2008 Georgian cyber incidents, have guided a great deal of discussion and policy.

Estonia 2007

In April of 2007, after relocating a Soviet-era World War II memorial from its prominent place in the capital city of Tallinn, Estonia suffered uncharacteristically violent protests by ethnic Russians.⁹⁰ Immediately afterward, a series of distributed denial of service (DDoS) attacks swept Estonian government and banking websites.⁹¹ Lasting approximately one month, the DDoS⁹² attacks prevented access to and defaced government websites and halted government e-mail traffic.⁹³ The DDoS attacks also interrupted Estonian Internet banking for portions of several business days.

The perpetrators of the DDoS attacks found a target-rich environment in Estonia. More than any other nation of its size, Estonia reflects an information systems society.⁹⁴ Wireless Internet, e-banking and web-based government services abound in Estonia. Internet access is available in a remarkable 98 percent of Estonian territory.⁹⁵ Home to the popular web-based voice call service Skype, Estonia boasts high rates of personal Internet usage and claims to have been the first country to conduct Internet elections.⁹⁶ Over 500,000 people, nearly half its citizens, have used government e-services.⁹⁷

At its outset, the 2007 Estonian event generated strong emotional reactions. Estonian politicians immediately compared the incident to an invasion and to

conventional military activity.⁹⁸ However, quickly after the true nature of the incident became apparent, Estonian authorities realized that by accepted metrics the event did not amount to armed attack. Although widespread within Estonia and of nearly a month's duration, the event produced chiefly economic and communications disruptions. Public confidence in government and electronic services likely suffered as well, but certainly not on the scale or in the nature anticipated by armed attack. Additionally, because the DDoS attacks transited as many as 178 countries,⁹⁹ Estonia never traced responsibility for the events to another State, despite lingering suspicion of Russian government involvement.¹⁰⁰ In the final analysis, Estonia attributed the disruptions to patriotic teams of ethnic Russian hackers, only loosely affiliated with one another.¹⁰¹

The Estonian response seems to confirm that an armed attack did not occur as well. Estonian countermeasures were entirely passive in nature. Estonian technicians replied largely by expanding network bandwidth to diffuse the effects of the DDoS attacks.¹⁰² The government focused its later responses on criminal investigations and also developing its domestic penal law to better account for cyber terrorism and intrusions.¹⁰³ Estonia seems at no point to have given serious thought to resorting to measures of self-defense under either the Charter or the NATO Washington Treaty.¹⁰⁴ Nor, given its difficulties attributing the attacks, does it seem it could have.

The Estonian cyber incident undoubtedly sounded an alarm for the international community. But while the event provoked calls for cooperative cyber forensics and criminal law enforcement, very little of the incident generated lessons or insights with respect to self-defense. Legal analyses conclude almost unanimously that the event did not give rise to the right of self-defense.¹⁰⁵ Only a year later, a similar incident would sound the same alarm and inspire comparable discussion, yet would immediately shed no greater light on self-defense and CNA.

Georgia 2008

Although in a *de facto* sense independent since 1991, the Caucasus region of South Ossetia has remained all the while part of the Republic of Georgia in a legal sense. In 2008, after an increase in Ossetian separatist activity, Georgia attempted to reassert control of the region.¹⁰⁶ These operations provoked a swift and militarily decisive intervention by Russian air and armored forces.¹⁰⁷

Before the physical invasion, Georgian government websites suffered a series of DDoS attacks.¹⁰⁸ The Georgian presidential website was out of service for more than 24 hours, then experienced manipulation including defacement of the President's image.¹⁰⁹ By the date of the Russian physical invasion, websites belonging to the Ministry of Foreign Affairs, Ministry of Defense, the National Bank and several

Georgian news outlets had already suffered DDoS attacks.¹¹⁰ The day following the invasion, Georgia's largest bank was also struck. All told, the DDoS operations continued for nearly a month, long outlasting kinetic hostilities and even postdating a ceasefire.¹¹¹

In terms of information technology, Georgia was no Estonia. In fact, the relatively underdeveloped Georgian information infrastructure may have mitigated the impact, economic and otherwise, of the incident.¹¹² While Georgia's highly concentrated distribution nodes simplified the attackers' task, Georgians did not rely heavily on government web-based or e-services. The greatest impact of the incident appears to have been reputational and related to restricting information flow between the government and its citizens during the invasion crisis.¹¹³

For purposes of characterizing the Georgian cyber incident as an armed attack, coincidence with the Russian physical invasion complicates legal analysis. The incident preceded, or more likely constituted part of, a conventional military invasion that undoubtedly qualified as an armed attack.¹¹⁴ Yet isolated from the succeeding kinetic measures, the cyber aspects of the Georgian incident were of minimal scope and intensity. At its worst, the cyber incident disrupted banking activities and limited communications between the Georgian government and the population. No loss of life, physical injury or destruction of property was directly attributable to the cyber operations. Perhaps the most interesting legal issues arising from the Georgian cyber incident concern timing of self-defense and whether the cyber disruptions could have been interpreted as an indication of imminent armed attack.

But the conclusions one can draw regarding the exercise of self-defense in the realm of pure cyber operations are limited. Similar to the Estonian episode, Georgia never identified conclusive evidence of Russian government responsibility for conduct of the disruptions. Also, the cyber incidents alone do not seem to have risen to the level of armed attack. Had the physical invasion not followed, the Georgian cyber incidents would likely have left Georgia in much the same place as 2007 Estonia: inconvenienced (though comparatively less so), vulnerable, angry and embarrassed. And while, at first impression, neither incident appears useful to elaborate on the details of self-defense doctrine, each may be a useful foreboding of future trends in CNA likely at some point to implicate self-defense.

While neither incident reached the threshold of armed attack, the costs of each in terms of security seem real. Classifying these events as mere communications disruptions or interference seems not to capture the function and importance of computer networks in the information age.¹¹⁵ If the Estonian and Georgian DDoS attacks did not cripple either State or produce damage to property or persons, they certainly reduced public confidence and exposed critical vulnerabilities. The chaos

and confusion of the Georgian cyber attacks may even have facilitated or set favorable conditions for Russian physical attacks. After these incidents, one might fairly ask whether failure to produce physical damage or injury really justifies placing these incidents on the lower end of a conflict spectrum and whether such events are aberrations or indications of the future of cyber conflict. One might also seriously ask whether more powerful States would have exercised similar restraint.

IV. Low-Intensity Cyber Strategy

A growing strand of cyber scholarship suggests the Estonian and Georgian incidents are harbingers of future cyber conflict. Within a broader spectrum of cyber attack, strategists highlight low-intensity cyber warfare as an increasingly prevalent and threatening form of conflict. By exploiting intrinsic tactical advantages, as well as weaknesses in Western military thinking, low-intensity CNA have great potential to abuse narrowly conceived models of conflict to the advantage of cyber insurgencies and States. Failing to perceive and treat the threats posed by low-intensity attacks hampers targets' long-term security and plays into the hands of the attacker. This section briefly explains how such attacks not only exploit tactical and strategic advantages but may also leverage the legal gaps identified previously.

Military doctrine commonly uses a conflict spectrum keyed to levels of violence.¹¹⁶ Along the cyber variant of the spectrum, low-intensity CNA distinguish themselves from their high-intensity counterparts in two important respects. First, low-intensity CNA add a dimension of concealment not apparent in high-intensity CNA. Specifically, in addition to masking the identity of the attacker, low-intensity CNA conceal their effects. They accomplish this largely through restraint in scale and scope. In the attacker's ideal scenario, the victim of low-intensity CNA is unaware of the damage to the target system. In other words, successful low-intensity CNA never awaken a sleeping giant.

Low-intensity CNA also differ from the majority of high-intensity CNA in their ability to frustrate correlation. In the event they *are* detected, successful low-intensity CNA should appear to the victim as unrelated or isolated events.¹¹⁷ Selecting varied targets, spreading effects and timing attacks in apparently random sequences prevent the target from perceiving the larger-scale, more threateningly coordinated effort of the attacker. Inability to correlate reduces the likelihood of response by the victim, despite cumulative reductions in capacity and efficiency. The analogy to the "death by a thousand cuts" is apt.¹¹⁸

In addition to being distinct from other CNA, low-intensity CNA are tactically and strategically attractive for several reasons. Tactically, low-intensity CNA are less likely to provoke debilitating responses from targets. Because the target is often

unaware the attack has happened at all, low-intensity CNA may provoke no response. Even if the victim becomes aware of the attack's effect, the isolated damage may be so limited that a response is simply not worthwhile. As a kinetic counterexample, the immense scale of the Al-Qaeda 9/11 attacks forfeited this tactical advantage, greatly compromising the organization's long-term capacity.¹¹⁹ Operating below the target's response threshold, low-intensity attacks avoid this blunder, simultaneously enjoying relative impunity and preserving the utility of the attacker's cyber tools for future operations.

Strategically, low-intensity CNA may also prove a wise effort. Low-visibility, low-intensity CNA may be effective to retard a target's economic, social and technological development. Such developmental constraint might easily yield long-term payouts in strategic competition. In a struggle for technological and military supremacy, even a slight advantage in efficiency or conversion capability may prove decisive.¹²⁰

Low-intensity CNA are also highly feasible. In general, cyber operations are often far less expensive than traditional military operations.¹²¹ The technology required is widely available and relies to a great extent on automation rather than personnel.¹²² Low-intensity CNA compound these advantages that CNA enjoy as a general matter. As one theorist observes, "You can do a simple attack against a lot of computers. Or you can do a sophisticated attack against a few computers. But it is really hard to do a sophisticated attack against a lot of computers, especially an attack that would achieve a meaningful military objective."¹²³

Further enhancing feasibility, low-intensity CNA permit incorporation of unaffiliated or even unsophisticated actors. Non-State actors such as cyber militias increasingly populate cyberspace, offering services for profit or political sympathy.¹²⁴ Enlistment may be as simple as offering a personal computer, Internet access and a web browser.¹²⁵ "Hacktivist" involvement in low-intensity CNA not only diffuses effects but also strengthens efforts to launder the sponsor's identity as the source of attack.¹²⁶ A victim might easily misinterpret well-masked hacktivist attacks as unrelated acts of vandalism rather than a concerted effort to degrade capacity or security.

In addition to these very practical advantages, advocates of low-intensity CNA base their arguments on flaws in military theory. Modern Western military thought has long rested on bifurcations of peace and war, notions of military and civilian separation.¹²⁷ Classic military theory reserves military action to escalations of hostile conduct between parties above recognized thresholds of violence.¹²⁸ Military legal disciplines reinforce the war-peace and military-civilian distinctions. The law governing the conduct of hostilities, or *jus in bello*, captures the military-civilian bifurcation through the targeting principle of distinction.¹²⁹ Similarly, the

law of war reflects the war-peace distinction through pervasive chapeau or application threshold provisions as prerequisites to operation of the law.¹³⁰ The vast majority of the positive *jus in bello* only operates in armed conflict between States. Recalling the *jus ad bellum* outlined in section I, one detects a similar bipolar assumption with respect to hostilities and self-defense. Under the Charter regime, either armed attack has occurred, unleashing the use of force, or something short of armed attack has occurred, restricting responses to peaceful means short of force.

Cyber theorists contrast these Western traditions with notions of conflict that understand military action as part of a general and continuous strategic competition between powers rather than as an exception to peace.¹³¹ If Western powers regard as legally extinct Clausewitz's characterization of war as a continuation of politics, competing views continue to carry Clausewitz's torch. Consistent with this tradition, work by two Chinese People's Liberation Army officers urges an appreciation of an unrestricted understanding of warfare extending into informational, commercial, currency and media realms.¹³²

Cyber conflict theorists argue that Western military thought's blind spot for unconventional and low-intensity hostilities renders States susceptible to abuse. Failing to perceive pinprick attacks as part of an enemy's expanded conception of conflict frustrates correlation and delays defensive efforts. Actors acquainted with States' military response thresholds and willing to extend their activities into traditionally civilian realms, such as strategic communication, currency exchange, trade and media, gain crucial strategic and tactical advantages. Low-intensity CNA are ideally suited to pursuing such advantages.

Finally, low-intensity CNA are attractive because they leverage seams in developed States' national security response structures. Particularly if directed at private enterprise, low-intensity CNA may successfully evade government computer network defenses. Moreover, private sector victims may not report attacks to public sector authorities to preserve investor and consumer confidence. Industries concerned with maintaining client privacy or trade secrets may be especially inclined to underreport low-intensity CNA.

The operational environment of cyberspace may not be the only incentive to low-intensity non-State actors' tactics. The law may incentivize such operations as well. Cyber operations just below the "use of force" threshold or even in the space between "use of force" and "armed attack" become attractive considering views that limit States' lawful responses to the latter. The *Wall* advisory opinion's view that self-defense is irrelevant to attacks by non-State actors surely fosters a sense of impunity or insulation from retribution or response. For example, one might imagine a protracted and diffuse campaign of cyber frontier incidents, designed to

harass and frustrate a target but also designed to remain below the legal threshold for measures in self-defense. If economic, communications and psychological effects, no matter how profound, don't trigger the right to respond with force, much less the armed attack threshold for use of self-defense, CNA seem a particularly apt means for imposing such effects to harm or at least harass and weaken States. This is especially the case if the strict legal view that limits the use of force to "armed attack" holds true.

In the end, coupled with emerging cyber doctrine, the Estonian and Georgian incidents might take on important new meaning. The arguments for low-intensity, low-impact cyber operations suggest they may no longer be the realm of criminals and economic saboteurs but rather deliberate strategies to influence the international security environment. Informed by a broader conception of cyber strategy and conflict theory, the Estonian and Georgian incidents might indeed mean something more to States and implicate self-defense and security in ways not obvious at the time of each, with important implications for the Charter's doctrine of self-defense. States may no longer be able to afford to treat such incidents as mere criminal acts or communications disruptions. States may very well look to measures in self-defense as a response to such events, notwithstanding their failure to comport with traditional understandings of "armed attack." The implications for the future of the UN Charter self-defense regime may be grim.

V. Conclusion: The Impact of Low-Intensity CNA on the Self-Defense Legal Regime

Scholars have built impressive careers predicting the demise of the Charter's security regime.¹³³ In 1970, Professor Thomas Franck argued that the Article 2(4) use of force regime mocked States from its grave.¹³⁴ He asserted that new forms of attack made the notions of war on which the Charter was based obsolete, while State practice eroded States' mutual confidence in the system.¹³⁵ Addressing self-defense, Franck presciently identified wars too small and wars too large to fit within Article 51.¹³⁶ Ultimately, Franck indicted incongruence between the norms of the international security system and the national interests of States as the perpetrator of his imagined legicide¹³⁷—perhaps the very same concerns that motivated the Senate's question to General Alexander.¹³⁸

So, are the laws regulating resort to force, and specifically self-defense, out of synch with planned cyber capabilities and strategies? Or more precisely, does the Charter's self-defense doctrine leave States adequate authority to respond to the full range of CNA threats they face?

The answer depends, in large part, on the version of self-defense one adopts. As section II demonstrated, despite a universally adopted codification and decades of jurisprudence and State practice, the doctrine of self-defense remains highly indeterminate. If General Alexander expressed satisfaction with the state of the law, his was likely a confidence grounded in a very broad and permissive understanding of the doctrine. Informed by views that regard the Charter's response gap skeptically or seek to define it away, one might indeed express satisfaction with the range of responses available to State victims of CNA. Espousing a similar view, the US State Department Legal Adviser recently offered a vote of confidence in self-defense doctrine as it relates to lethal overseas counterterrorism efforts.¹³⁹

Yet such permissive views of self-defense suffer the textual shortcomings of their forebears.¹⁴⁰ Christine Gray asserts that States rarely speak of self-defense in purely legal terms.¹⁴¹ Her evaluation is difficult to square with claims that in the post-Charter world States defend nearly all uses of force as self-defense.¹⁴² Yet the future may prove Gray's observation increasingly accurate. Recent State expressions appear particularly vague and open-textured, grounded in notions of instinct, rights of survival and natural law rather than positivist models of conflict regulation.¹⁴³ Increasingly, it seems States have resurrected pre-Charter notions that self-defense includes all means necessary for self-preservation against all threats. Practice is offered to the exclusion of positivist expressions of law, rather than as a vehicle for elucidating or understanding it. Even committed international law sovereigntists must detect discomfiting, pre-Charter realist tones.

On the other hand, if one adopts the narrower view of self-defense, including the apparent textual response gap between use of force and armed attack, the general's proffered mismatch between law and capacity may indeed be real. Particularly with respect to low-intensity CNA, State victims appear hostage to law that would deny resort to proportionate countermeasures and restrict effective action to a security regime paralyzed by politics.

What emerges appears to be a choice of threats. Either one accepts a real threat to the positive *jus ad bellum*'s claim to law, or one accepts very real threats to States' security as a trade-off for preserving legal idealism. Neither reflects well on the future of the law. Each constitutes a mismatch in its own sense.

If past predictions of the demise of the Charter's security regime, such as Franck's, have proved exaggerated,¹⁴⁴ low-intensity CNA may vindicate them yet. As Franck's critics point out, the international security environment of the twentieth century likely profited from the Charter's limits through undetectable instances of restraint.¹⁴⁵ The argument claims the Charter regularly influenced decisions to refrain from resort to force but unlike decisions to use force, restraint leaves little in

the way of observable evidence. Yet the prospect of low-intensity CNA is likely to change the calculus of these decisions.

With these cheap, anonymous and effective weapons, States find a greatly altered international security game. The low barriers to entry into CNA, and particularly low-intensity CNA, greatly increase the number of potential players.¹⁴⁶ Just in terms of frequency of occurrence, the number of instances in which States will be called upon to evaluate whether resort to force or measures in self-defense is justified or necessary increases.

Further, as the Estonian and Georgian episodes still suggest to many, non-State actors may be effective proxies for States in CNA. It appears non-State actors will be a persistent feature of future CNA. And for non-State actors operating on their own behalf, modern hostilities offer few levelers on the order of CNA. CNA are tremendous force multipliers and are abundantly available. Low-intensity CNA offer the potential for catastrophic effects against asymmetrically developed and resourced States. Conversely, many non-State actors are simply retaliation- and even deterrence-proof, offering defenders little in the way of targets.

Thus, low-intensity CNA not only increase the population of attackers but also the pool of potential defenders. This is true in two senses. First, as the Georgian event shows, even States with rudimentary information systems capacity present ripe targets for CNA. More States present themselves as potential targets of hostile acts, increasing in absolute terms the opportunity and likelihood that hostilities will erupt. Second, more States are likely to participate themselves in CNA for the same reasons that more non-State actors are. Thus in a CNA security environment, more States will possess means to respond to attacks or, more important, to events short of armed attack yet sufficiently disruptive or annoying to provoke a hostile response.

On a related note, and equally disruptive to restraint in the exercise of self-defense, CNA may permit more States to “go it alone.” As a more attainable means of self-defense, CNA may free States from reliance on collective security arrangements. In contrast to the twentieth century’s bipolar security environment, CNA’s low barriers to entry may lead to a multipolar system of lone actors. Decisions whether to resort to self-defense will lack the temperance and restraint that collective security arrangements have offered. Thus, low-intensity CNA may topple preexisting vertical arrangements of States into a level or horizontal array of power.

Finally, CNA rearrange the cast of actors in the security environment in a more literal way. CNA render geography largely meaningless. States previously insulated from armed attack by distance or terrain enjoy no such benefits in cyberspace. Borders and neighbors do not determine one’s cyber security. Rather, in an ironic

sense, susceptibility to attack may be a function of the extent to which a State relies on the very information technology that is targeted. As information systems proliferate the target environment becomes richer, increasing the frequency with which States must make decisions about exercising self-defense.

The preceding factors suggest critical consequences for the viability of self-defense doctrine. As low-intensity CNA increase the pool of defenders, attackers and targets, opportunities for disparate or even idiosyncratic views or approaches to self-defense will also proliferate. Low-intensity CNA will generate conflicting accounts of self-defense doctrine with respect to applicability to non-State actors and the “armed attack” threshold, as well as other issues such as anticipatory and collective self-defense. It is ominously clear that the phenomena that prompted Franck to pronounce the death of the Charter security regime are not merely also present in CNA; they are present in far greater degrees.

Few of the developments, legal or technical, outlined in this article portend a stable or effective international self-defense regime. Rather than evince satisfaction with the bargain struck in 1945, emerging views on self-defense, such as that expressed by General Alexander, likely reflect altered understandings of limits on States’ freedom of action. The effects on the integrity and viability of the law of self-defense are compounded if one extrapolates the opportunity to interpret and apply self-defense doctrine to the vast cast of actors, State and non-State, in cyberspace. While surely motivated in part by legitimate perceptions of very real threats, these views are highly susceptible to producing a chaotic, dangerous and multipolar security environment. Faced with the daunting prospect of persistent low-intensity CNA, ruling views on self-defense may quickly become in fact entirely untethered from the Charter’s security regime. Understood in light of emerging low-intensity CNA doctrine, the Estonian and Georgian events become highly relevant to the development of self-defense law. One can easily imagine, and might already conjure, a law of self-defense that resorts to the Charter’s regime in name only, revealing it to have been as Stone posited, one of many “vain attempts to abolish power.”¹⁴⁷

Notes

1. Initial orders to create the command date to mid-2009. See Ellen Nakashima, *Gates Creates Cyber-Defense Command*, WASHINGTON POST, June 24, 2009, at A08, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/23/AR2009062303492.html>. Appropriately enough, information on Cyber Command, often referred to as CYBERCOM, is available from a US Department of Defense website. See http://www.defense.gov/home/features/2010/0410_cybersec (last visited Sept. 20, 2010).

2. William J. Lynn III, *Introducing U.S. Cyber Command*, WALL STREET JOURNAL, June 3, 2010, § A, at 15, available at <http://online.wsj.com/article/SB10001424052748704875604575280881128276448.html>.

3. Ellen Nakashima, *Cyber Command Chief Says Military Computer Networks Are Vulnerable to Attack; U.S. military networks in war zones could be targeted, Alexander says*, WASHINGTON POST, June 4, 2010, at A02, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/03/AR2010060302355.html>.

4. Advance Questions for Lieutenant General Keith Alexander, USA, Nominee for Commander, United States Cyber Command 9 (on file with author) [hereinafter General Alexander Advance Questions]. See *Nominations of VADM James A. Winnefeld, Jr., USN, to be Admiral and Commander, U.S. Northern Command/Commander, North American Aerospace Defense Command; and LTG Keith B. Alexander, USA, to be General and Director, National Security Agency/Chief, Central Security Service/Commander, U.S. Cyber Command: Hearing Before the S. Comm. on Armed Services*, 111th Cong. (2010), http://armed-services.senate.gov/testimony.cfm?wit_id=9367&id=4505.

5. General Alexander Advance Questions, *supra* note 4, at 9.

6. *Id.* One might easily imagine, especially considering General Alexander's additional position as Director of the National Security Agency, that his response had in mind domestic legal limitations as much as international law.

7. *Id.* at 11–12.

8. *Id.* at 12.

9. *Id.* at 11. General Alexander submitted a portion of his response on the topic of international law on the use of force in a classified supplement. See *id.*

10. See Bill Lambrecht, *U.S. is Busy Thwarting Cyber Terrorism*, LATIMES.COM (June 24, 2010), <http://www.latimes.com/business/la-fi-cyber-terrorism-20100624,0,3306751.story>. Early in the current president's tenure, cyber security took a prominent place in national security strategy. See The White House, *Cyberspace Policy Review* (2009), available at <http://www.whitehouse.gov/administration/eop/nsc/cybersecurity>.

11. See *infra* section III.

12. See David Sadoff, *A Question of Determinacy: The Legal Status of Anticipatory Self-Defense*, 40 GEORGETOWN JOURNAL OF INTERNATIONAL LAW 523 (2009) (concluding no legal consensus exists on anticipatory self-defense); W. Michael Reisman & Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-Defense*, 100 AMERICAN JOURNAL OF INTERNATIONAL LAW 525 (2006) (predicting the possibility of future invocations of preemptive self-defense); Sean D. Murphy, *The Doctrine of Preemptive Self-Defense*, 50 VILLANOVA LAW REVIEW 699 (2005) (identifying methodological differences as the source of divergence in international lawyers' disagreements over preemptive self-defense); Thomas M. Franck, *Preemption, Prevention and Anticipatory Self-Defense: New Law Regarding Recourse to Force?*, 27 HASTINGS INTERNATIONAL AND COMPARATIVE LAW REVIEW 425 (2004) (advocating abandonment of preemptive self-defense as inconsistent with the UN Charter).

13. See Carsten Stahn, *Collective Security and Self-Defense after the September 11 Attacks*, 10 TILBURG FOREIGN LAW REVIEW 10 (2002); George K. Walker, *Anticipatory Collective Self-Defense in the Charter Era: What the Treaties Have Said*, 31 CORNELL INTERNATIONAL LAW JOURNAL 321 (1998); Hans Kelsen, *Collective Security and Collective Self-Defense under the Charter of the United Nations*, 42 AMERICAN JOURNAL OF INTERNATIONAL LAW 783 (1948).

14. See Roberto Barsotti, *Armed Reprisal*, in THE CURRENT LEGAL REGULATION OF THE USE OF FORCE 79 (Antonio Cassese ed., 1986) (identifying "radical change" in the doctrine of self-defense as regards resort to armed reprisal); Michael A. Newton, *Reconsidering Reprisals*, 20

DUKE JOURNAL OF COMPARATIVE & INTERNATIONAL LAW 361 (2010) (arguing that a refined doctrine of reprisal might produce clearer limiting criteria than strained resorts to self-defense).

15. See *Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. 161, ¶¶ 67–77 (Nov. 6) (rejecting US justification for use of force as self-defense on failure to meet burden of proof); Geoffrey Corn & Dennis Gyllensporre, *International Legality, the Use of Military Force, and Burdens of Persuasion: Self-Defense, the Initiation of Hostilities, and the Impact of the Choice between Two Evils on the Perception of International Legitimacy*, 30 PACE LAW REVIEW 484 (2010) (identifying incentive structures resulting from comparative burdens of proof required of self-defense versus collective security action).

16. Professor Dinstein is perhaps best known for this characterization of self-defense. See YORAM DINSTEIN, *WAR, AGGRESSION & SELF-DEFENCE* (4th ed. 2005). See also ANTHONY CLARK AREND & ROBERT J. BECK, *INTERNATIONAL LAW AND THE USE OF FORCE* 31 (1993). Professor Dinstein observes, “Only when the universal liberty to go to war was eliminated, could self-defence emerge as a right of signal importance in international law.” DINSTEIN, *supra* at 177. A competing characterization asserts that the right of self-defense preceded the UN Charter use-of-force regime and thus stands as an autonomous legal right rather than an exception. See MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION* 217–20, 232–41 (1961); JULIUS STONE, *AGGRESSION AND WORLD ORDER* 99–101 (1958) (identifying “absurdities” through extreme examples of a strict reading of Article 51); Sean D. Murphy, *Self-Defense and the Israeli Wall Opinion: An Ipse Dixit from the Court?*, 99 AMERICAN JOURNAL OF INTERNATIONAL LAW 62, 64 (2005) (emphasizing that the Charter includes an “inherent” right of self-defense) (emphasis in original). The United States’ understanding of self-defense also appears to emphasize the inherent rather than exceptional nature of self-defense under international law. US Navy, US Marine Corps & US Coast Guard, *The Commander’s Handbook on the Law of Naval Operations NWP 1-14M/MCWP 5-12.1/COMDTPUB P5800.7A*, 4-4–4-5 (2007) [hereinafter *Commander’s Handbook*] (citing Chairman of the Joint Chiefs of Staff Instruction 3121.01B, *Standing Rules of Engagement/Standing Rules for the Use of Force for US Forces* (2005)).

17. U.N. Charter art. 2, para. 4

18. *Id.*, art. 51. Articles 39 and 42, in conjunction, form the second exception to the Article 2(4) prohibition, permitting States to use force when authorized by the Security Council.

19. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 57–58 (7th ed. 2008) (admitting, however, the possibility of limited international personality for some international organizations); 1 *INTERNATIONAL LAW: BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT* 136–37 (Elihu Lauterpacht ed., 1970).

20. Indeed, the 9/11 terror attacks on the United States provoked a significant legislative effort to strengthen domestic law enforcement. See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act)*, Pub. L. No. 107-56, 115 Stat. 272 (2001); Claude d’Estree & Luke Andrew Busby, *U.S. Response to the Events of September 11, 2001: The USA PATRIOT Act, Title III*, in *LAW IN THE WAR ON INTERNATIONAL TERRORISM* 107 (Ved P. Nanda ed., 2005) (analyzing and forecasting consequences of the Act).

21. See John Arquilla, *The New Rules of War*, FOREIGN POLICY, Mar./Apr. 2010, at 60, available at http://www.foreignpolicy.com/articles/2010/02/22/the_new_rules_of_war (Arquilla observes, “[T]errorists and transnational criminals have embraced connectivity to coordinate global operations in ways that simply were not possible in the past. Before the Internet and the

World Wide Web, a terrorist network operating cohesively in more than 60 countries could not have existed. Today, a world full of Umar Farouk Abdulmutallabs awaits—and not all of them will fail.”).

22. LINDSAY MOIR, *REAPPRAISING THE RESORT TO FORCE: INTERNATIONAL LAW, JUS AD BELLUM, AND THE WAR ON TERROR* 150 (2010) (noting the novelty of the Taliban/Al-Qaeda relationship, where “the government of a State had apparently been inferior to, or dependent upon, a terrorist organization within its territory”).

23. However, international shipping and naval forces have suffered increased attacks by Somali pirates in the western Indian Ocean. See *Piracy at Sea*, NYTIMES.COM, http://topics.nytimes.com/top/reference/timestopics/subjects/p/piracy_at_sea/index.html?scp=2&sq=somalia%20pirates&st=cse (last updated Nov. 10, 2010) (noting a record number of pirate attacks in 2009); Borzou Daragahi & Edmund Sanders, *Pirates Show Range and Daring*, LATIMES.COM (Nov. 18, 2008), <http://articles.latimes.com/2008/nov/18/world/fg-piracy18>.

24. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, ¶ 80 (July 9) [hereinafter *Legal Consequences of the Construction of a Wall*]. Israel has since removed portions of the wall in response to improving security. See Sheera Frenkel, *Israel Removes Wall, Palestinians Remain Wary*, NPR.COM (Aug. 18, 2010), <http://www.npr.org/templates/story/story.php?storyId=129279814>.

25. *Legal Consequences of the Construction of a Wall*, *supra* note 24, ¶¶ 138–39.

26. *Id.*, ¶ 138 (citing U.N. Doc. A/ES-10/PV.21 at 6 (Oct. 20, 2003)).

27. *Id.*, ¶ 139.

28. *Id.*, ¶ 33 (separate opinion of Judge Higgins).

29. *Id.*, ¶ 6 (declaration of Judge Buergenthal).

30. See Murphy, *supra* note 16, at 62 (describing the opinion as “startling in its brevity and, upon analysis, unsatisfactory”); Ruth Wedgwood, *The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense*, 99 AMERICAN JOURNAL OF INTERNATIONAL LAW 52, 58 (2005). But see Iain Scobbie, *Words My Mother Never Taught Me—“In Defense of the International Court,”* 99 AMERICAN JOURNAL OF INTERNATIONAL LAW 76, 77 (2005) (regarding the opinion’s statements on self-defense as “well-founded”).

31. Murphy, *supra* note 16, at 67–70.

32. MOIR, *supra* note 22, at 140–47. CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 136 (3d ed. 2008).

33. See Murphy, *supra* note 16, at 67.

34. GRAY, *supra* note 32, at 137 (citing SC 1944th meeting (1976)).

35. *Id.*

36. S.C. Res. 568, ¶¶ 1, 4, U.N. Doc. S/RES/568 (June 21, 1985).

37. See *Commander’s Handbook*, *supra* note 16, at 3–10 (permitting US Navy vessels to exercise authority beyond territorial waters where pursuit is initiated in internal waters).

38. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 1 (Dec. 19) [hereinafter *Armed Activities*].

39. See Phoebe N. Okowa, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 55 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 742, 747–48 (2006) (citing Position of the High Command of Uganda on the Presence of the Uganda Peoples Defence Forces in the DRC (Sept. 11, 1998). Counter-Memorial of the Government of Uganda, vol. I, annex 27 & ch. 3 (Apr. 21, 2001)).

40. *Armed Activities*, *supra* note 38, ¶ 147. The Court identified “no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces.” *Id.*

Reinforcing its skepticism of the Ugandan self-defense claim, the Court added, "The Court cannot fail to observe, however, that the taking of airports and towns many hundreds of kilometres from Uganda's border would not seem proportionate to the series of transborder attacks it claimed had given rise to the right of self-defence, nor to be necessary to that end." *Id.*

41. Okowa, *supra* note 39, at 749; Stephanie A. Barbour & Zoe A. Salzman, "The Tangled Web": *The Right of Self-Defense against Non-State Actors in the Armed Activities Case*, 40 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 53 (2007) (concluding the *Armed Activities* case left an understanding of self-defense ill-prepared for threats posed by non-State actors in control of State territory).

42. *Armed Activities*, *supra* note 38, ¶ 8 (separate opinion of Judge Simma).

43. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 195 (June 27). It should be noted that for jurisdictional reasons, the *Nicaragua* Court analyzed the customary rather than purely-Charter-based body of law.

44. *Id.*

45. See Christopher J. Le Mon, *Unilateral Intervention by Invitation in Civil Wars: The Effective Control Test Tested*, 35 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 741 (2003) (charting operation of the effective control test as a limit on State interventions).

46. Although not addressing self-defense specifically, the International Criminal Tribunal for the former Yugoslavia developed an alternative standard for State responsibility in the 1999 *Tadic* case. *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, ¶ 120 (Int'l Crim. Trib. for the former Yugoslavia July 15, 1999) (determining that to attribute actions of rebels to a State "it is sufficient that the group as a whole be under the *overall control* of a State") (emphasis added).

47. See DINSTEIN, *supra* note 16, at 207–8; Christian J. Tams, *The Use of Force against Terrorists*, 20 EUROPEAN JOURNAL OF INTERNATIONAL LAW 359, 377 (2009).

48. See NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT (2004).

49. S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

50. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

51. William Howard Taft IV, *The Bush (43rd) Administration*, in SHAPING FOREIGN POLICY IN TIMES OF CRISIS: THE ROLE OF INTERNATIONAL LAW AND THE STATE DEPARTMENT LEGAL ADVISER 127, 128–29 (Michael P. Scharf & Paul R. Williams eds., 2010).

52. Press Release, North Atlantic Treaty Organization, Statement by the North Atlantic Council (Sept. 12, 2001), available at <http://www.nato.int/docu/pr/2001/p01-124e.htm>.

53. North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243, available at http://www.nato.int/cps/en/natolive/official_texts_17120.htm.

54. See DINSTEIN, *supra* note 16, at 207–8; Barbour & Salzman, *supra* note 41, at 65 (noting that Resolutions 1368 and 1373 compound uncertainty whether non-State actors can rise to the level of armed attack).

55. GRAY, *supra* note 32, at 18–20.

56. U.N. Charter art. 25.

57. Even ICJ decisions only bind parties to the case. See Statute of the International Court of Justice art. 59, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993. Louis Sohn has written impressively on the issue of which and how UN agents should interpret the Charter. Louis B. Sohn, *The UN System as Authoritative Interpreter of Its Law*, in 1 UNITED NATIONS LEGAL ORDER 169 (Oskar Schachter & Christopher C. Joyner eds., 1995).

58. U.N. Charter art. 31 (permitting non-members of the Security Council to participate in discussions where the latter considers their interests to be "specially affected").

59. See, e.g., THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 676 n.141 (Bruno Simma et al. eds., 1995) (recounting Security Council debate of the lawfulness of Israeli strikes initiating the 1967 Six-Day War) [hereinafter UN CHARTER COMMENTARY].

60. THOMAS FRANCK, RECOURSE TO FORCE 77 (2002) (surveying UN Security Council reactions to use of force in self-defense by Belgium, Turkey, Israel and, on six separate occasions, the United States).

61. *Id.*

62. U.N. Charter art. 51. Scholars generally recognize two schools of thought on the threshold of self-defense: a narrow understanding, viewing “armed attack” as the exclusive trigger for the right of self-defense, and a broad understanding, viewing “armed attack” as but one of many events capable of justifying resort to self-defense. See Natalino Ronzitti, *The Expanding Law of Self-Defense*, 11 JOURNAL OF CONFLICT AND SECURITY LAW 343, 344–45 (2006); Norman M. Feder, *Reading the U.N. Charter Connotatively: Toward a New Definition of Armed Attack*, 19 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLICY 395, 403–4 (1987) (evaluating both views and advocating the narrow variant).

63. Professor Brownlie notes that the records of the San Francisco diplomatic conference include no explanation of the term “armed attack.” IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 279 (1963). However, a historical account of the creation of the United Nations provides some background and parole evidence. See STEPHEN C. SCHLESINGER, ACT OF CREATION: THE FOUNDING OF THE UNITED NATIONS 181–83 (2003) (offering a narrative account of diplomatic efforts to draft Article 51).

64. STONE, *supra* note 16, at 72.

65. See UN CHARTER COMMENTARY, *supra* note 59, at 663 n.11 (citing exclusively German-language authors).

66. See *id.* at 663 (“It is to be emphasized that Arts. 51 and 2(4) do not exactly correspond to one another in scope, i.e. [,] not every use of force contrary to Art. 2(4) may be responded to with armed self-defence”).

67. The records of the Charter’s drafting conference suggest strongly that economic coercion would also not qualify as a use of force. See UN CHARTER COMMENTARY, *supra* note 59, at 112 (noting States’ rejection of a Brazilian proposal to include economic coercion within the scope of the Article 2(4) prohibition).

68. See STONE, *supra* note 16, at 72 n.168 (quoting Netherlands delegate M. Röling).

69. See Michael Schmitt, *Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework*, 37 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 885, 934 (1999).

70. STONE, *supra* note 16, at 72.

71. Military and Paramilitary Activities, *supra* note 43, ¶ 195.

72. *Id.* The Court relied on the General Assembly’s Definition of Aggression in significant part. *Id.* (relying on G.A. Res. 3314 (XXIX), U.N. Doc. A/RES/3314 (Dec. 14, 1974)).

73. *Id.*

74. *Id.* With respect to these findings, Gray observes, “The Court gave no authority for this Statement and was criticized for its failure to do so by some commentators.” CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 143 (2d ed. 2004).

75. See UN CHARTER COMMENTARY, *supra* note 59, at 664.

76. See DINSTEIN, *supra* note 16, at 193–96 (confirming the gap theory of the Charter’s response structure); BROWNLIE, *supra* note 63, at 279 (observing, “Indirect aggression and the incursions of armed bands can be countered by measures of defence which do not involve military operations across frontiers”). For discussion of the topic in the context of CNA specifically, see

THOMAS C. WINGFIELD, *THE LAW OF INFORMATION CONFLICT: NATIONAL SECURITY LAW IN CYBERSPACE* 47–49 (2000); Schmitt, *supra* note 69, at 929 (observing that only CNA intended to directly cause physical destruction or injury authorize forcible responses under the Charter).

77. Further support for the gap theory may be found in the International Court of Justice *Nicaragua* and *Oil Platforms* cases. See DINSTEIN, *supra* note 16, at 193–94; Military and Paramilitary Activities, *supra* note 43, ¶ 191; *Oil Platforms*, *supra* note 15, ¶ 51.

78. See David J. Scheffer, *Commentary on Collective Security*, in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER* 101–4 (Lori Fisler Damrosch & David J. Scheffer eds., 1991) [hereinafter Damrosch & Scheffer].

79. GRAY, *supra* note 32, at 177.

80. See discussion *supra* p. 66 (citing Military and Paramilitary Activities, *supra* note 43, ¶ 195).

81. See W. Michael Reisman, *Allocating Competences to Use Coercion in the Post–Cold War World*, in Damrosch & Scheffer, *supra* note 78, at 39.

82. See GRAY, *supra* note 32, at 181 (citing William Howard Taft IV, *Self-Defense and the Oil Platforms Decision*, 29 *YALE JOURNAL OF INTERNATIONAL LAW* 295, 302 (2004)).

83. Taft, *supra* note 82, at 295.

84. *Oil Platforms*, *supra* note 15, ¶ 12 (separate opinion of Judge Simma). I am grateful to Professor Wolff Heintschel von Heinegg for alerting an audience to this passage at a recent international law symposium.

85. *Id.*

86. See Military and Paramilitary Activities, *supra* note 43, ¶ 249. Curiously, however, the Court restricted forcible countermeasures to the victim State, ruling out collective use thereof. *Id.*

87. See UN CHARTER COMMENTARY, *supra* note 59, at 664 (citing Julius Stone, *Force and the Charter in the Seventies*, 2 *SYRACUSE JOURNAL OF INTERNATIONAL LAW AND COMMERCE* 1, 11–12 (1974); ALFRED VERDROSS & BRUNO SIMMA, *UNIVERSELLES VÖLKERRECHT: THEORIE UND PRAXIS* ¶ 472 (3d ed. 1984)).

88. Reisman, *supra* note 81, at 43.

89. See, e.g., WALTER GARY SHARP, *CYBERSPACE AND THE USE OF FORCE* (1999); WINGFIELD, *supra* note 76; Eric Jensen, *Computer Attacks on Critical National Infrastructure: A Use of Force Invoking the Right of Self-Defense*, 38 *STANFORD JOURNAL OF INTERNATIONAL LAW* 207 (2002); Schmitt, *supra* note 69 (developing the most influential model for assessing the legal significance of cyber events).

90. For an excellent account of the Estonian incident, see ENEKEN TIKK, KADRI KASKA & LIIS VIHUL, *INTERNATIONAL CYBER INCIDENTS: LEGAL CONSIDERATIONS* 14–25 (2010) [hereinafter TIKK ET AL.].

91. See *id.* at 20.

92. DDoS describes the use of masses of bogus access requests to websites to flood communications channels, inducing shutdown. See Herbert S. Lin, *Offensive Cyber Operations and the Use of Force*, 4 *JOURNAL OF NATIONAL SECURITY LAW AND POLICY* 63, 70 (2010).

93. See TIKK ET AL., *supra* note 90, at 20–21, 24–25.

94. See *id.* at 16–18.

95. See *id.* at 17.

96. See *id.* at 17–18 (citing *Estonia First Country in the World to Introduce Internet Voting*, EURACTIV, <http://www.euractiv.com/en/egovernment/estonia-country-world-introduce-internet-voting/article-145735> (last updated June 15, 2007)).

97. See TIKK ET AL., *supra* note 90, at 18.

98. Ian Traynor, *Russia Accused of Unleashing Cyberwar to Disable Estonia: Parliament, ministries, banks, media targeted: Nato experts sent in to strengthen defences*, GUARDIAN (London), May 17, 2007, Home Pages at 1, available at <http://www.guardian.co.uk/world/2007/may/17/topstories3.russia>.

99. Charles Clover, *Kremlin-backed Group Behind Estonia Cyber Blitz*, FT.COM (Mar. 11, 2009), <http://www.ft.com/cms/s/0/57536d5a-0ddc-11de-8ea3-0000779fd2ac.html>.

100. Noah Schactman, *Kremlin Kids: We Launched the Estonian Cyber War*, WIRED (Mar. 11, 2009), <http://blog.wired.com/defense/2009/03/pro-kremlin-gro.html>. An Internet security consultant speculates the Russian government employed an organization known as the Russian Business Network (RBN) to carry out the attacks on its behalf in exchange for immunity for prior criminal acts. See Linton Chiswick, *Cyber Attack Casts New Light on Georgia Invasion*, THE FIRST POST (Aug. 15, 2008), <http://www.thefirstpost.co.uk/45135/features/cyber-attack-casts-new-light-on-georgia-invasion>. The consultant describes the RBN as

a shadowy, St Petersburg-based internet company . . . believed to provide secure hosting for much of the world's online crime, from illicit pornography to credit card fraud and phishing. It is also believed to control the world's biggest and most powerful "botnet"—a network of infected zombie computers of a scale necessary to perform destructive cyber-terrorism or cyber-warfare on an entire State.

Id.

101. See TIKK ET AL., *supra* note 90, at 23.

102. See *id.* at 24.

103. See *id.* at 26–29.

104. *Id.* at 25–26.

105. See *id.*

106. See *id.*

107. See Michael Schwartz, Anne Barnard & C. J. Chivers, *Russia and Georgia Clash Over Separatist Region*, NYTIMES.COM (Aug. 8, 2008), <http://www.nytimes.com/2008/08/09/world/europe/09georgia.html?hp> (offering a same-day account of the invasion); Peter Finn, *A Two-Sided Descent Into Full-Scale War*, WASHINGTON POST, Aug. 17, 2008, at A1, available at http://www.washingtonpost.com/wp-dyn/content/article/2008/08/16/AR2008081600502_pf.html (offering expanded, day-by-day accounts of events leading up to and the conduct of the invasion).

108. See TIKK ET AL., *supra* note 90, at 70; John Markoff, *Before the Gunfire, Cyberattacks*, NEW YORK TIMES, Aug. 13, 2008, at A1.

109. See TIKK ET AL., *supra* note 90, at 70.

110. See *id.* at 70–72.

111. See *id.*

112. See *id.* at 78.

113. See *id.*

114. Not surprisingly, Russia defended the invasion as an exercise of self-defense to address Georgian maltreatment of Russian citizens in South Ossetia. Yet under the traditional view, only one side may lawfully claim self-defense. As Dinstein suggests, "There is no self-defence from self-defence." DINSTEIN, *supra* note 16, at 178.

115. See ALVIN TOFFLER, THE THIRD WAVE (1984) (describing transition from an industrial-centric to an information-centric age).

116. Headquarters, Department of the Army, FM 3-0, Operations, at 2-2 (2008) (describing situations of increasing violence, including stable peace, unstable peace, insurgency and general war).

117. Antoine Lemay, José M. Fernandez & Scott Knight, *Pinprick attacks, a lesser included case?*, in CONFERENCE ON CYBER CONFLICT, PROCEEDINGS 2010, at 183, 191 (Christian Czosseck & Karlis Podins eds., 2010) [hereinafter Lemay et al.].

118. See *id.* at 190.

119. Gustavo De Las Casas, *Destroying al-Qaeda Is Not an Option (Yet)*, FOREIGN POLICY.COM (Nov. 10, 2009), http://www.foreignpolicy.com/articles/2009/11/10/the_case_for_keeping_al_qaeda?page=0,0 (noting that since 2001 40 percent of Al-Qaeda leadership has been killed or captured).

120. See Lemay et al., *supra* note 117, at 190. Lemay and his co-authors describe conversion capability as the ability of a State to transform strategic resources, such as knowledge and money, into military advantage, usually through a military-industrial complex. *Id.*

121. See TECHNOLOGY, POLICY, LAW, AND ETHICS REGARDING U.S. ACQUISITION AND USE OF CYBERATTACK CAPABILITIES 2-2 (William A. Owens, Kenneth W. Dam & Herbert S. Lin eds., 2009).

122. See *id.*

123. See Samuel Liles, *Cyber Warfare: As a Form of Low-Intensity Conflict and Insurgency*, in CONFERENCE ON CYBER CONFLICT, *supra* note 117, at 47, 53 (quoting BRUCE D. BERKOWITZ, THE NEW FACE OF WAR: HOW WAR WILL BE FOUGHT IN THE 21ST CENTURY 147 (2003)).

124. See Rain Ottis, *From Pitchforks to Laptops: Volunteers in Cyber Conflicts*, in CONFERENCE ON CYBER CONFLICT, *supra* note 117, at 97.

125. See *id.*

126. One wonders, however, whether unorganized or undisciplined hacktivists might compromise the relative advantage of denying the target correlation through overly enthusiastic attacks.

127. DAVID A. BELL, THE FIRST TOTAL WAR 24–25 (2007) (noting the eighteenth-century advent of a Western conceptual separation of military and civilian).

128. Lemay et al., *supra* note 117, at 188.

129. See LAW OF WAR HANDBOOK 166 (Keith E. Puls ed., 2005) (this publication of the US Army's Judge Advocate General's School describes distinction as the "grandfather of all principles" of the law of war).

130. See, e.g., Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 2, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Convention No. II with Respect to the Laws and Customs of War on Land art. 2, July 29, 1899, 32 Stat. 1803, 1 Bevans 247.

131. See Lemay et al., *supra* note 117, at 189; Liles, *supra* note 123, at 48–49.

132. QIAO LIANG & WANG XIANGSUI, UNRESTRICTED WARFARE (1999).

133. Thomas Franck, *Who Killed Article 2(4)?*, 64 AMERICAN JOURNAL OF INTERNATIONAL LAW 809 (1970).

134. *Id.* at 809.

135. *Id.*

136. *Id.* at 812.

137. *Id.* at 836.

138. See *supra* p. 59.

139. Harold Hongju Koh, Legal Adviser, US Department of State, Remarks at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), <http://www.state.gov/s/l/releases/remarks/139119.htm>.

140. *See supra* pp. 68–69.

141. GRAY, *supra* note 32, at 28.

142. *See* DINSTEIN, *supra* note 16, at 178; WINGFIELD, *supra* note 76, at 40–41; UN CHARTER COMMENTARY, *supra* note 59, at 663.

143. *See* Koh, *supra* note 139 (reciting the inherent right to self-defense to justify targeting of terror suspects). In a recently published account of his experience as State Department Legal Adviser, Abraham Sofaer observes that no US president has ever accepted or is ever likely to accept a restrictive view of the right to self-defense. Sofaer explicitly rejects the notion “that a State may exercise its right of self-defense only if the ‘attack’ is carried out by another State and occurs on the territory of the State claiming the right to defend itself.” Abraham Sofaer, *The Reagan and Bush Administrations*, in *SHAPING FOREIGN POLICY IN TIMES OF CRISIS*, *supra* note 51, at 55, 83.

144. *See* Louis Henkin, *The Reports of the Death of Article 2(4) Are Greatly Exaggerated*, 65 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 544 (1971).

145. *See id.*

146. *See* Ottis, *supra* note 124, at 99–101.

147. STONE, *supra* note 16, at 104 (characterizing ambiguity of resort to force terminology as evidence of limits of legal efforts to curb States’ pursuit of self-interest in international relations).

V

Cyber Operations and the *Jus in Bello*: Key Issues

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On August 7, 2008, Georgian forces launched attacks into South Ossetia, including against Russian troops who were in the breakaway region as “peacekeepers.” The *jus ad bellum* issues surrounding the conflict remain controversial.¹ However, it is incontrovertible that once Georgian and Russian forces became embroiled in hostilities against each other, an international armed conflict subject to the *jus in bello* (international humanitarian law (IHL) or the law of armed conflict) had begun.

During the conflict, numerous defacement and denial of service cyber operations were directed against Georgian entities.² The cyber targets included the websites of the President; Parliament; Foreign Affairs, Defence and Education ministries; domestic and foreign media; banks; and private Internet servers and blogs. For instance, defacement of the Ministry of Foreign Affairs website included the posting of a collage of photos of Adolf Hitler and Georgian President Mikheil Saakashvili. Similarly, the site of the National Bank of Georgia was replaced with one depicting twentieth-century dictators together with Saakashvili. On average, each operation lasted two hours. Although no physical damage or injuries were reported, the disruption of services proved severe. In particular, the Georgian government found itself unable to broadcast information about the

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conflict and Georgian banks went off-line, as a self-imposed precautionary measure, for ten days.

The identity of the originators of the operations remains uncertain. As with those against Estonia the previous year, most of the operations were traceable to Russia but there was no conclusive evidence that the Russian government conducted the attacks or was otherwise involved therein. While certain of them were traceable to Russian government computers, the possibility that they were “pwned,” that is, taken over for the purpose of mounting attacks, cannot be ruled out. Nevertheless, that a website containing potential Georgian cyber targets and malicious software, StopGeorgia.ru, came on line within hours of the commencement of hostilities aroused suspicions of governmental involvement.

Foreign governments and private sources promptly assisted the Georgians. Google provided hosting services for Georgian sites, an important contribution in light of its advanced security. The Georgian Ministry of Defence and Ministry of Foreign Affairs websites were moved to US and Estonian servers, while the Polish President made his website available for posting Georgian government information about the conflict. Despite these efforts, the attacks significantly disrupted the operation of the Georgian cyber infrastructure.

As the Georgia case illustrates, cyber operations have become embedded in modern warfare. This article examines three central IHL issues raised by cyber operations mounted during armed conflicts: the principle of distinction, direct participation by civilians in hostilities and classification of conflict. It makes no effort to explore the *jus ad bellum*, which is addressed by companion contributions to this volume of the International Law Studies. As the normative architecture governing cyber operations remains indistinct, it must be cautioned that the conclusions drawn are those of the author alone and somewhat tentative. However, attention is drawn to the ongoing efforts of a group of international experts working under the auspices of the NATO Cooperative Cyber Defence Centre of Excellence to craft a *Manual on the International Law of Cyber Warfare*.³ Said manual, albeit soft law, will help clear much of the legal fog of cyber warfare.

Cyber Operations and the Principle of Distinction

Article 48 of Additional Protocol I requires the parties to a conflict to “at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly direct their operations only against military objectives.”⁴ In doing so, it restates the customary law principle of distinction, which has been labeled by the International Court of Justice as one of two “cardinal” principles of IHL (the other being the prohibition of unnecessary

suffering).⁵ It is incontrovertible that the principle applies to cyber operations conducted during an armed conflict.

The devil, however, is in the details. Note the term “operation” in Article 48. Its use would at first glance appear to prohibit any cyber activity directed against civilians or civilian objects. Yet operations aimed at the civilian population are not uncommon during armed conflict, the paradigmatic example being psychological operations, which are generally deemed lawful unless they cause physical harm or human suffering.

Subsequent articles resident in Additional Protocol I shed light on the foundational intent of the principle of distinction. In particular, they “operationalize” Article 48 by setting forth restrictions, prohibitions and requirements that are typically framed in terms of “attacks.” Article 51.1 exemplifies this operationalization. It states that the “civilian population and individual civilians shall enjoy general protection against dangers arising from military operations,” but goes on to note that “[t]o give effect to this protection, the following rules . . . shall be observed in all circumstances.” The rules include the prohibitions on making the civilian population or individual civilians the “object of *attack*,”⁶ conducting “indiscriminate *attacks*,”⁷ and engaging in “*attacks* against the civilian population or civilians by way of reprisal.”⁸ Article 51 also illustrates the notion of “indiscriminate” by reference to two types of operations. The first is “an *attack* . . . which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects.”⁹ The second is an expression of the principle of proportionality, which bars “an *attack* which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”¹⁰

Other articles take the same approach. Article 52, the property counterpart to Article 51’s protection of civilians, forbids making civilian items the “object of *attack*” and limits *attacks* to military objectives.¹¹ Article 54 notes that it is “prohibited to *attack*, destroy, remove or render useless objects indispensable to the survival of the civilian population,”¹² whereas Article 55 prohibits “[a]*ttacks* against the natural environment by way of reprisals.”¹³ Article 56 provides that “[w]orks or installations containing dangerous forces . . . shall not be made the object of *attack*, even where these objects are military objectives, if such *attack* may cause the release of dangerous forces and consequent severe loss among the civilian population.”¹⁴ It further provides that “[o]ther military objectives located at or in the vicinity of these works or installations shall not be made the object of *attack*” if the attack may result in similar consequences.¹⁵

A central component of the principle of distinction is that “[i]n the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.”¹⁶ Despite the reference to “operations,” the normatively meaningful aspects of the attendant requirements are set forth in terms of attacks. Indeed, the article itself is titled “precautions in *attack*.” According to the article, “those who plan or decide upon an *attack*” are required to “do everything feasible to verify that the objectives to be *attacked* are neither civilians nor civilian objects and are not subject to special protection,”¹⁷ “take all feasible precautions in the choice of means and methods of *attack*” in order to minimize civilian harm¹⁸ and “refrain from deciding to launch an *attack*” that may be expected to violate the rule of proportionality.¹⁹ “*Attacks* must be canceled or suspended if it becomes apparent” that the intended target is not a military objective or if the strike would run counter to proportionality limitations,²⁰ and “effective advance warning shall be given of *attacks* which may affect the civilian population” should circumstances permit.²¹ When considering possible targets, and choice is possible between them without forfeiting military advantage, “the objective to be selected shall be that the *attack* on which may be expected to cause the least danger to civilian lives and civilian objects.”²² None of the provisions of Article 57 may be interpreted as “authorizing any *attacks* against the civilian population, civilians or civilian objects.”²³ The focus on attacks appears again in the following article, which imposes an obligation on defending parties to take “precautions against the effect of *attacks*” in order to safeguard civilians and civilian objects.²⁴

The emphasis on restricting military operations by reference to attacks appears repeatedly in other chapters of Additional Protocol I. For example, medical units are not to be made the “object of *attack*,” may not be used to “shield military objectives from *attack*” and must be located, whenever possible, so that “*attacks* against military objectives do not imperil their safety.”²⁵ Prohibitions exist on making those *hors de combat* due to wounds or surrender and individuals parachuting from a disabled aircraft an object of *attack*.²⁶ Combatants are obligated to “distinguish themselves from the civilian population while they are engaged in an *attack* or in a military operation preparatory to *attack*,”²⁷ and “[i]t is prohibited . . . to *attack*, by any means whatsoever, non-defended localities.”²⁸

As should be apparent, the reference to operations in Article 48 must be interpreted as bearing on a particular type of operation, an attack. Operations not amounting to an attack, such as psychological operations, are generally accepted as lawful.

But what is an attack? Article 49 of Additional Protocol I, in a provision that certainly reflects customary understandings of the term, defines attacks as “acts of violence against the adversary, whether in offence or in defence.”²⁹ The linkage between

operations and violence is further revealed in the International Committee of the Red Cross's (ICRC) *Commentary* to Article 48, which notes that "the word operation should be understood in the context of the whole section; it refers to military operations during which violence is used."³⁰ That Additional Protocol I and its official commentary define both operations and attacks by reference to the notion of violence further strengthens the conclusion that application of the principle of distinction generally depends on an attack having occurred and that an attack is an action during armed conflict that is violent in nature.

Since the plain text of Article 49 appears to require a violent act for qualification as an attack, by a strict textual interpretation, non-kinetic operations, i.e., operations which themselves do not comprise physical force, would be excluded. This appeared to have been the prevailing interpretation at the time the Additional Protocol was drafted. As noted in Bothe, Partsch and Solf's (all involved in drafting the Protocol) respected commentary on the provision: "The term 'acts of violence' denotes physical force. Thus, the concept of 'attacks' does not include dissemination of propaganda, embargoes, or other non-physical means of psychological or economic warfare."³¹ Similarly, the ICRC *Commentary* on Article 49 suggests that "the term 'attack' means 'combat action.'"³²

It must be remembered that although treaties are to be interpreted "in accordance with the ordinary meaning to be given to their terms," said interpretations must be made in "context and in the light of [their] object and purpose."³³ At the time Additional Protocol I was drafted, cyber operations did not exist; virtually all military "attacks" employed means that released kinetic energy, as through an explosion or the force of a bullet striking an individual. While the text of Article 49 is framed in terms of the nature of the act amounting to an attack, the drafters must have been primarily concerned with its consequences for the civilian population. Protection of the population was the Protocol's central "object and purpose" with regard to the rules of targeting. "Violence" merely constituted useful prescriptive shorthand for use in rules designed to shield the population from harmful effects. Despite being styled as act-based norms (violence), they are in fact consequence-based.

The text of Additional Protocol I's various rules developing the principle of distinction supports this conclusion. Article 51 sets out the general premise that civilians "enjoy general protection against *dangers* arising from military operations" and bars those acts or threats of violence "the primary purpose of which is to spread *terror* among the civilian population."³⁴ It also frames the principle of proportionality by reference to expected "incidental *loss* of civilian life, *injury* to civilians, *damage* to civilian objects," a formula repeated in Article 57.³⁵ During attacks, the precautions requirements of Article 57 mandate selection of methods

and means of warfare in order to minimize “incidental *loss* of civilian life, *injury* to civilians and *damage* to civilian objects,”³⁶ the issuance of warnings if an attack may “*affect* the civilian population,”³⁷ and choosing among potential targets in part based on the goal of causing “the least *danger* to civilian lives and to civilian objects.”³⁸ With regard to aerial and naval operations, attacks must take all reasonable precautions “to avoid *losses* of civilian lives and damage to civilian objects.”³⁹ In other articles, the environment is protected against “widespread, long-term and severe *damage*”⁴⁰ and dams, dykes and nuclear electrical generating stations are protected out of concern for “severe *losses* among the civilian population.”⁴¹

As these examples clearly illustrate, it is not the violence of the act that constitutes the condition precedent to limiting the occurrence of an attack, but the violence of the ensuing result. In other words, the legal prohibition is on attacking, rather than targeting, protected persons and objects. This interpretation should not be considered novel, for it has always been the case that operations employing biological contagions or chemicals have been characterized as attacks, even though non-kinetic in nature, because their consequences could prove harmful, even lethal. Thus, Bothe, Partsch and Solf, despite the extract above from their classic work, correctly defined attacks in a consequence-based fashion by asserting that the term referred to “those aspects of military operations that most directly affect the safety of the civilian population and the integrity of civilian objects.”⁴²

Cyber operations can unquestionably generate such consequences even though they launch no physical force themselves. For instance, a cyber operation against an air traffic control system would place aircraft, whether military or civilian, at risk. Or one targeting a dam could result in the release of waters, thereby endangering persons and property downstream. In neither case would the actual act be destructive, but in both the consequences would be. Referring back to the requirement of violence, and its development in Additional Protocol I, cyber operations can therefore qualify as “attacks,” even though they are not themselves “violent,” because they have “violent consequences.” A cyber operation, like any other operation, is an attack when resulting in death or injury of individuals, whether civilians or combatants, or damage to or destruction of objects, whether military objectives or civilian objects.

A cyber operation that is intended, but fails, to generate such results would be encompassed in the concept, in much the same way that a rifle shot that misses its target is nevertheless an attack in IHL. Similarly, one expected to cause collateral damage to civilian objects or incidental harm to civilians would qualify, even if no harm befell the military objective targeted. This latter point is somewhat unique to cyber operations since lawful kinetic operations are typically intended to cause the requisite harm to the target, with incidental harm to civilians being a by-product of

the attack, as with civilians caught within the blast radius of a bomb employed against a military facility. In a cyber operation, however, the target may not be physically harmed at all, yet the operation could nevertheless result in collateral damage or incidental injury, as in simply opening the floodgates of a dam.

By this interpretation, the operations against Georgia were not attacks and therefore not unlawful under international humanitarian law. They involved disruption and defacement, but no physical harm to objects or injury to persons.

There is an alternative approach, one suggested by Dr. Knut Dörmann of the ICRC's legal division.⁴³ Dörmann points to the definition of military objectives in Article 52.2 of Additional Protocol I, one generally accepted as the correct articulation of customary law, as support for his position: "military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."⁴⁴ Noting that the definition includes "neutralization," he suggests that "[i]t is irrelevant whether an object is disabled through destruction or in any other way."⁴⁵ In doing so, he dispenses with the requirement for damage, destruction, death or injury for an action to qualify as an attack. Consequently, the prohibition on "attacking" civilians and civilian objects extends to cyber operations "targeting" them. By the Dörmann approach, many of the cyber operations conducted against Georgia would qualify as "attacks" and those targeting civilian systems would be unlawful under IHL.

The approach is not unreasonable in light of the severe non-physical harm that can be caused by cyber operations. It responds to concerns that the other approach is under-inclusive. However, Dörmann's poses the opposite risk, that of over-inclusivity. It would encompass, for instance, all denial of service attacks, including those in which mere inconvenience resulted, as in the case of blocking a television broadcast or university website. State practice provides no support for the notion that causation of inconvenience is intended to be prohibited in IHL. On the contrary, inconvenience and interference with the daily lives of civilians are a frequent result of armed conflict and psychological operations directed against the civilian population are common. Dörmann is to be commended for identifying the unsatisfactory result of limiting "attacks" to those operations causing death, injury, damage or destruction, but his proposed remedy goes too far.

It also relies on law that is not directly on point. Military objectives are those objects that may be attacked. But the preliminary question is whether an attack is being conducted or contemplated. Only when that question is answered in the affirmative does the definition of military objective come into play. The issue with regard to the definition of military objectives is *what* may be attacked, not how or with

what consequences. Moreover, the drafters envisioned “neutralization” in the context of an attack. The term was included to encompass cases involving “an attack for the purpose of denying the use of an object to the enemy without necessarily destroying it.”⁴⁶ Examples include using landmines to render an area of land impassable or firing antipersonnel munitions at enemy surface-to-air missile sites to force gun crews to take cover while an air attack against other targets is under way.⁴⁷

By the principle of distinction, civilian objects may not be attacked during armed conflict. With respect to cyber operations, one unsettled issue is whether data resident in computers comprise an “object.” The implications of the answer are momentous. To the extent they do, direct operations against civilian data would constitute an unlawful attack on a civilian object. Further, any harm caused to civilian data during a cyber attack on a lawful military objective would have to be considered in the proportionality calculation and when determining the nature of the precautions required during attack.

No definitive answer to this question exists. It would appear overbroad to characterize all data as “objects.” Surely a cyber operation that deletes an innocuous e-mail or temporarily disrupts a television broadcast does not amount to an unlawful attack on a civilian object. For instance, it is well-settled that an operation employing electronic warfare to disrupt civilian media is lawful. It would make no sense to distinguish between such an operation and a cyber operation that destroys data to achieve precisely the same result.

Absent an agreed-upon interpretation in the cyber context, it is perhaps best to tread lightly in characterizing data as an object. Doing so might be appropriate in two situations. First, some data are directly transferable into tangible objects. For instance, banking account data are designed to be immediately transformable into money at an automatic teller machine. To the extent the data are destroyed, so too is the tangible equivalent, the money. There are few examples of such data. Second, some data have intrinsic value. An example would be digital art. If the data are destroyed, the art is as well. Presumably, it should be protected as civilian property and in some cases as cultural property. But again, such cases are rare.

Generally, data should not be characterized as an object in itself. Rather, the determinative question is whether the consequences attendant to its destruction involve the requisite level of harm to protected physical objects or persons. If so, the cyber operation constitutes an unlawful attack.

Cyber operations also bear on certain issues regarding application of the concept of military objectives. Networking means that there is a much higher likelihood that cyber systems will be dual-use (used for both military and civilian purposes), and thereby qualify as military objectives. Similarly, military reliance on software and hardware produced for the civilian population arguably renders facilities

that produce them lawfully targetable war-supporting military objectives. And, since cyber systems are essential to the economy, certain of them may constitute war-sustaining objects, which the United States, as distinct from most other countries, characterizes as military objectives.⁴⁸

The cyber operations against Georgia illustrate these points. In no case did the operations qualify as “attacks” under IHL, since no physical damage or injury resulted. But assuming solely for the sake of analysis that they did, some, such as those against Ministry of Defence servers, would have been lawful as directed against military objectives (although the hacktivists enjoyed no belligerent right to engage in hostilities in the first place). Others, such as those targeting the Ministry of Education and media facilities, would have violated IHL proscriptions.

Additionally, the operations against Georgia illustrate two practical aspects of cyber operations. First, it is likely that attackers will target “soft sites,” that is, sites that are not well-secured. The most vulnerable are those in the civilian or non-security governmental sectors. In future conflicts, attacks on civilian cyber targets are therefore highly likely. Second, the attacks on the banking system illustrate the appeal of targeting objects that might fall into the contentious “war-sustaining” category. For instance, it would be simpler and less risky to undermine a State’s oil export capacity with cyber attacks that disrupt storage and distribution than to physically destroy the facilities and the transportation links upon which export depends. This is especially so when a State is capable of effectively defending against traditional kinetic attacks.

Cyber Operations and Direct Participation in Hostilities

Those who qualify as combatants enjoy the belligerent right of engaging in hostilities; no reason exists to distinguish cyber from kinetic military operations in this regard. However, cyber operations do present some difficulty as to application of the rules regarding direct participation by civilians in hostilities. According to Article 51.3 of Additional Protocol I, “civilians shall enjoy the protection afforded by this Section [which addresses the conduct of hostilities], unless and for such time as they take a direct part in hostilities.” A comparable provision exists for non-international armed conflict, and the notion is undoubtedly customary in nature.⁴⁹ The consequence of the rule is that civilians may be targeted while they directly participate in hostilities. Additionally, such direct participants do not factor into either the proportionality analysis or precautions in attack requirements. The question, then, is when do civilians who participate in cyber, as distinct from kinetic, operations become direct participants in hostilities.

Analysis begins by determining whether the individuals concerned qualify as members of the armed forces. If so, the direct participation rules do not apply since they may be targeted directly even when not participating in hostilities. In its *Interpretive Guidance on the Notion of Direct Participation in Hostilities*, the ICRC has included organized armed groups belonging to a party to the conflict in the category of armed forces.⁵⁰ Although the *Guidance* has proven controversial in other respects,⁵¹ consensus existed among the experts convened to develop the product that it was appropriate to treat organized armed groups in the same manner as the armed forces for the purposes of targeting law.

But when do hackers and non-military groups engaging in cyber operations qualify as organized armed groups? By definition, an organized armed group must be both organized and armed. With regard to the former criterion, the most troublesome question is whether a group may be “organized virtually.” In the virtual domain, groups exist whose members never have any physical contact. Such groups have many purposes—social, educational, financial, charitable and so forth. In fact, it is not rare for dispersed military personnel to organize themselves virtually, as in the case of intelligence sharing.

IHL does not develop the notion of organization to the degree necessary to come to definitive conclusions regarding virtual organization. The ICRC’s *Commentary* to Additional Protocol I notes that

[t]he term “organized” is obviously rather flexible, as there are a large number of degrees of organization. In the first place, this should be interpreted in the sense that the fighting should have a collective character, be conducted under proper control and according to rules, as opposed to individuals operating in isolation with no corresponding preparation or training.⁵²

Drawing on this definition, at one end of the continuum would be those “groups” consisting of autonomous actors who are simply all targeting a State, perhaps in response to a broad call to do so from one or more sources. They do not operate under the direction of a particular individual nor does the group have any formal organizational structure. These groups cannot be deemed to be organized, and, therefore, individuals involved therein remain civilians subject to the rules of direct participation.

At the other end are those who act collectively and cooperatively. Albeit virtual, an online group may have a defined command structure and coordinate its activities—for instance, by allocating cyber targets, developing and sharing hacker tools, cooperating in identifying target vulnerabilities and conducting postattack

damage assessments. There is little justification for excluding groups of this nature from “armed forces” on the basis of organization.

A possible counterargument is that the requirement of organization is intended to allow for enforcement of IHL. However, such an assertion confuses a requirement of organization for the purposes of prisoner of war status and for qualification as a party to the conflict with the norms applicable to targeting. As noted in the *Interpretive Guidance*,

it would contradict the logic of the principle of distinction to place irregular armed forces under the more protective legal regime afforded to the civilian population merely because they fail to . . . conduct their operations in accordance with the laws and customs of war. Therefore, even under the terms of the Hague Regulations and the Geneva Conventions, all armed actors showing a sufficient degree of military organization and belonging to a party to the conflict must be regarded as part of the armed forces of that party.⁵³

The difficult case lies between these extremes, that of an informal grouping of individuals who act with shared purpose. For instance, they access a common website containing tools and vulnerable targets but do not coordinate their attacks. Whether a group of this nature meets the organization criterion should depend on such context-specific factors as the existence of a formal or informal leadership entity directing the group’s activities in a general sense, identifying potential targets and maintaining an inventory of effective hacker tools. In most cases, collective action alone would not satisfy the organization criterion. However, as activities began to resemble those of a cooperative group, it is increasingly likely that States would treat said group as an “armed force,” rather than a collection of civilian direct participants.

An organized group must also be “armed” to qualify as an armed force. The logical construction of “armed” is that the group carries out “attacks,” as that term is understood in IHL. After all, while certain members of the armed forces, or even certain components thereof, may have no “violent” function, the concept of armed forces makes no sense in the absence of a *group* purpose of violence. This interpretation is further supported by the notion of “combatants” (who enjoy the belligerent privilege of attacking lawful targets) since they are also defined as members of the armed forces.⁵⁴ Without a group purpose of engaging in attacks, whether cyber or kinetic, the members of an organized virtual group remain civilians to whom the rules of direct participation apply. Accordingly, a group that conducts cyber operations not amounting to attacks (whether directed at military or civilian targets) is but a collection of civilians. To the extent the activities of individual members of the group constitute direct participation in hostilities, they become targetable. Of

course, the reach of the adjective “armed” depends on the interpretation adopted vis-à-vis the term “attack.”

The *Interpretive Guidance* adds two qualifiers to the notion of organized armed groups, both of which have proven controversial. First, in order to be treated as the armed forces, the group must “belong to a party to the conflict,” which requires “at least a *de facto* relationship” between the group and a party to the conflict.⁵⁵ The relationship can be either declared or “expressed through tacit agreement or conclusive behaviour that makes it clear for which party the group is fighting.”⁵⁶ This requirement has correctly been criticized on the basis that the critical issue in targeting is not the entity for whom the potential target is fighting, but rather against whom that group is engaged in hostilities. However, assuming for the sake of analysis that the requirement applies, it would exclude those organized armed groups in an international armed conflict that might be directing cyber attacks against one of the parties for reasons other than support of the opposing party. According to the ICRC, such attacks might nevertheless amount to a separate non-international armed conflict between the group and the target State, although this approach has equally been the subject of criticism.⁵⁷ Presumably, the criterion would also exclude patriotic hacker groups unaffiliated with one of the belligerent parties, even if conducting cyber attacks for its benefit, because the group’s activities would lack the “agreement” of that party and its actions would in no other way be attributable to the party under the law of State responsibility.⁵⁸

The second qualifier found in the *Interpretive Guidance* is that only members of an organized armed group who have a “continuous combat function” qualify as members of the armed forces for targeting purposes.⁵⁹ A continuous combat function is a duty that would meet the requirements of direct participation if the individual concerned was not a group member. Whether group members engaged in cyber operations have a continuous combat function depends on application of the direct participation criteria set forth below.

This criterion is controversial, with critics arguing that it affords greater protection to members of organized armed groups, who enjoy no right to engage in hostilities, than official members of the armed forces, who do.⁶⁰ As a general matter the criterion is no more compelling in the cyber context than in that of physical operations. This is so because it derives from concern over the possible difficulty of distinguishing group members from civilians on the battlefield.⁶¹ This prospect is especially likely during cyber operations, in which the identity of those who have launched an operation may be uncertain or where the military and civilian cyber communities share networks and transmission assets. Yet, difficult as distinction may sometimes be, IHL already contains a presumption of civilian status in the case of doubt, thereby obviating the need to impose the continuous combat

function criterion.⁶² That presumption would apply equally to those engaging in cyber hostilities.

In the case of Georgia, there appear to have been no organized armed cyber groups. The attacks do not seem to have been coordinated, nor is there any compelling evidence of an overarching group structure. Further, the attacks were not “armed” in the sense that they did not cause physical damage to property or injury to individuals. Therefore, individuals engaged in conducting them would at most have qualified as direct participants in hostilities, who may have been targeted for such time as they directly participated.

The key issues regarding direct participation surround 1) the nature of direct participation and 2) the duration of the “for such time” window. The *Interpretive Guidance* suggests three cumulative constitutive elements that must be present before an act amounts to direct, as distinct from indirect, participation in hostilities. First, the act must “be likely to adversely affect the military operations or military capacity of a party to an armed conflict, or, alternatively, to inflict death, injury or destruction on persons or objects protected against direct attack” (threshold of harm). Second, “there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part” (direct causation). Finally, the act must be specifically designed to “directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another” (belligerent nexus).⁶³ In the cyber context, any act that directly impedes a belligerent’s military operations or capabilities or constitutes an attack on protected persons or objects would qualify as direct participation so long as a nexus existed between the act and the armed conflict. Examples would include cyber military intelligence gathering, disrupting enemy cyber networks and manipulating data in the enemy’s military systems.

These requirements are generally deemed acceptable, although disagreement does exist at their margins.⁶⁴ For instance, it has been suggested that the “threshold of harm” criterion be extended to include operations designed to enhance one’s own capabilities. An example would be developing cyber defenses or identifying cyber vulnerabilities in military cyber systems. The second element, causality, is equally necessary, but many critics of the *Guidance* took issue with its example of assembling improvised explosive devices as *indirect* causation. Similar objections would be raised if the analogous case of developing software specific to a particular cyber operation or enemy system were characterized as indirect, vice direct, causation.

The major issue presented by the *Interpretive Guidance* centered on the meaning of the phrase “for such time,” referring to the period during which a direct participant is susceptible to lawful attack. The phrase has long been the subject of

controversy, with critics alleging that it created a “revolving door.”⁶⁵ In other words, while a direct participant is deploying to and from an operation, he may be attacked. However, once he successfully returns home he regains the full immunity from attack that civilians enjoy, at least until such time as he deploys again to directly participate in hostilities. Although the ICRC has argued that this dynamic is not a malfunction of IHL,⁶⁶ critics point out that it creates an imbalance between the direct participant and the member of the regular armed forces, since the latter is open to attack at any time based solely on his status. In the view of the critics, these individuals should be deemed to be directly participating for such time as they regularly engage in acts of hostilities; there should be no periods of immunity from attack between the qualifying acts.

Cyber operations bring this issue into even greater focus. First, there may be no “deployment” at all since only a computer, and not proximity to the target, is required to mount the operations. The restrictive interpretation of the for such time criterion would suggest that the direct participant can only be attacked while actually launching the operation. This is problematic in that many cyber operations last mere minutes, perhaps only seconds. Such a requirement would effectively extinguish the right to strike at direct participants. Moreover, the effect of a cyber operation may be long-delayed, as in the case of a surreptitiously emplaced logic bomb. Would the target of such an operation only be entitled to attack the direct participant while the logic bomb is being emplaced? The problem is that the very point of these operations is to avoid detection. Therefore, from a practical perspective, there would appear to be no window of opportunity for the victim of an attack to respond. In the cyber conflict environment, therefore, the only reasonable interpretation of “for such time” is that it encompasses the entire period during which the direct cyber participant is engaging in repeated cyber operations.

Cyber Operations as Armed Conflict

Cyber operations are a particularly attractive means of targeting an opponent, for the technology necessary to conduct them is cheap and accessible. In particular, they represent an effective method for a weaker State to strike at a technologically more advanced, and therefore more vulnerable, adversary. But do cyber operations comprise “armed conflict,” as that term is used in IHL? This is “the” threshold question, for IHL does not apply in the absence of armed conflict.

When cyber operations are merely one aspect of an ongoing armed conflict, they must comport with the IHL applicable to that category of armed conflict. For instance, because the conflict between Russia and Georgia was international in character, the ensuing cyber operations were subject to the law of international

armed conflict. Any operations qualifying as attacks under that body of law would, if directed at civilians, constitute violations of IHL and war crimes.

The difficult case involves cyber operations that take place in the absence of kinetic hostilities. Can they constitute an armed conflict, and, if so, what type? Unfortunately, IHL treaty law does not define the phrase “armed conflict” *per se*. Rather, it only expands on the two subcategories of armed conflict, international and non-international armed conflict.

As to international armed conflict, Common Article 2 to the four 1949 Geneva Conventions is traditionally viewed as the proper articulation of the scope of international armed conflict: “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties.”⁶⁷ In explaining the article’s reach, the ICRC’s commentary thereon notes that

[a]ny difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, how much slaughter takes place, or how numerous are the participating forces.⁶⁸

The International Criminal Tribunal for the former Yugoslavia (ICTY) has likewise opined that “an armed conflict exists whenever there is resort to force between States.”⁶⁹

This threshold must not be confused with that of an “armed attack,” the condition precedent for acts in self-defense under the *jus ad bellum*.⁷⁰ The International Court of Justice (ICJ) described armed attacks in the *Nicaragua* case as involving certain “scale and effects,” which excluded “a mere frontier incident.”⁷¹ Under IHL, however, an “international armed conflict” commences whenever an armed exchange between States occurs, regardless of the scale and effects of the hostilities.

Applied to cyber operations, it is clear that any operation by or attributable to a State that results in damage to or destruction of objects or injury to or death of individuals of another State would commence an international armed conflict. This is because they constitute attacks under IHL. More problematic from a classification of conflict point of view are cyber operations causing no damage or injury, but instead merely inconvenience, disruption, disorder or irritation. The results of such operations might nevertheless be severe, as in significant interference with the economy, transportation system or other critical infrastructure.

One possibility is to limit international armed conflict to situations in which “attacks” have occurred. Since attacks are “acts of violence,”⁷² doing so would comport with the fact that IHL only applies once a conflict is “armed,” as well as

with the ICRC *Commentary*'s reference to intervention by the armed forces. Although uncontested occupation and detention also constitute armed conflict while harming neither persons nor objects,⁷³ they both rely on the possibility of enforcement through the use of force. By this interpretation, non-destructive computer network exploitation, espionage, denial of service attacks and other invasive but non-destructive cyber operations would not initiate an armed conflict. The dilemma is that in practice States targeted by non-destructive, yet otherwise severe, attacks might treat the operations as armed conflict that justified, for instance, kinetic attacks on their enemies' military objectives and combatants.

A second possibility for classification of events involving cyber operations is one based on the more liberal Dörmann definition of attacks, which includes operations targeting civilians and civilian objects irrespective of whether they were physically damaged or injured. Because directing operations against protected persons or objects constitutes an attack by this interpretation, an international armed conflict would commence once a State or those under its control launched them. However, the position is arguably over-inclusive in that by focusing on the target of an operation, it has no means to distinguish non-destructive "attacks" from non-destructive military operations that fail to qualify as attacks, such as lawful psychological operations directed at the civilian population.

Both approaches have merit, the former in its fidelity to received understandings of IHL, the latter in that it would respond to concerns that the traditional understanding is under-inclusive since it admits of highly disruptive cyber operations to which IHL would not apply. As it stands, though, the former represents *lex lata*, the latter *lex ferenda*.

A major complication is the current prevalence of cyber operations by non-State actors, as in the case of the Georgia-Russia conflict. Such actions will typically take on the character of the kinetic conflict under way and be dealt with by the relevant rules of targeting, especially those governing direct participation by civilians in hostilities. However, a classification dilemma arises when cyber operations are conducted by non-State actors in the absence of related kinetic operations.

The issue of attribution of a non-State actor's acts to a State is complex. The traditional test was set forth by the International Court of Justice in the *Nicaragua* case. There, the Court articulated the "effective control" test. It held that

United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras* [Nicaraguan guerrillas], the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient . . . for the purpose of attributing to the United States the acts committed by the *contras* All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a

high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the *contras* without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.⁷⁴

This test was reaffirmed by the Court in the *Congo* and *Genocide* cases.⁷⁵ However, although the test is often cited with regard to conflict classification, the actual issue in *Nicaragua* was State responsibility for alleged actions of the *contras*.

By contrast, the Appeals Chamber of the ICTY dealt with the issue of conflict classification directly in *Tadic*. Explicitly rejecting the effective control test, it held that the authority of the Federal Republic of Yugoslavia over the Bosnian Serb armed groups “required by international law for considering the armed conflict to be international was *overall control* going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations.”⁷⁶

The debate over the applicable standard remains unsettled. Nevertheless, there is no question but that a State may be responsible for the actions of non-State actors and that such responsibility may result in the existence of an international armed conflict. Therefore, when a State directs particular cyber *attacks* by non-State actors (*Nicaragua*) or (perhaps) participates in general planning and supervision (*Tadic*) of such attacks, an international armed conflict comes into being between the target State and the State exercising control over the attackers. By contrast, no armed conflict commences when a State simply tolerates or sympathizes with cyber attacks emanating from its territory, although the State may be in breach of its international legal obligation to “police” its territory to ensure it is not used to the detriment of other States.⁷⁷

Determining whether a cyber operation conducted in the absence of kinetic operations comprises *non*-international armed conflict is more challenging still. Common Article 3 to the Geneva Conventions styles non-international armed conflicts as those that are “not of an international character.”⁷⁸ Specifically, non-international armed conflict is that which occurs between a State and organized armed groups or between such groups. Two criteria exist—organization and intensity.

Organization has been dealt with earlier with regard to qualification as an organized armed group vis-à-vis the rules of direct participation. The criterion would rule out any attacks mounted by either individual “hackers” or groups of hackers who lack the necessary degree of organization as non-international armed conflict.

Such attacks would therefore be governed by domestic criminal law and human rights norms, not IHL. As to “virtually” organized groups, the analysis set forth above would apply. To the extent the group in question qualified as an organized armed group, the first criterion for non-international armed conflict would be met.

Non-international armed conflicts must also evidence a certain degree of intensity. Unlike international armed conflict, non-international armed conflict requires more than mere limited hostilities. In particular, “internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature” are excluded from the ambit of such conflict.⁷⁹ According to the ICTY in the *Tadic* case, non-international armed conflicts involve “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State,”⁸⁰ a definition embraced by the International Criminal Tribunal for Rwanda and present in the Statute of the International Criminal Court.⁸¹

This criterion would keep most cyber attacks (in the absence of kinetic operations) from qualifying as non-international armed conflict. In particular, the protracted requirement would rule out individual or sporadic attacks irrespective of their destructiveness. Moreover, non-destructive cyber operations would, as discussed, be unlikely to even qualify as armed conflict at all. Given the intensity criterion, they certainly would not with regard to non-international armed conflict. The result is that cyber attacks conducted against a State must be quite intense before constituting a non-international armed conflict.

It should finally be noted that, although Additional Protocol II also addresses non-international armed conflict for States party thereto, it only applies when an organized armed group involved in the conflict “exercise[s] such control over a part of” a State’s territory that it can “carry out sustained and concerted military operations.”⁸² Obviously, a group conducting solely cyber operations against a State would fail to meet this requirement.

Concluding Thoughts

This article has but scratched the surface of the many problematic issues surrounding application of IHL to cyber operations. Three were singled out for attention and of these none was fully resolved. The dilemma is that IHL was crafted during a period in which the cyber operations were but science fiction. However, today no modern military enters the battlespace without at least some reliance on computers and computer networks. For the modern military, cyber capabilities represent both force multipliers and vulnerabilities. And as demonstrated in the case of the Georgia-Russia conflict, civilian cyber assets are an especially attractive target set,

not only for militaries, but also for individuals or groups intent on involvement in the conflict in question.

IHL must respond to the challenges posed by this new technology. The past decade has witnessed numerous efforts, in particular by the Naval War College, to identify challenges posed by cyber warfare to the extant norms of IHL, and to international law more generally.⁸³ Today, practitioners and scholars are increasingly sensitive to the challenges, such as those set forth in this article, of applying IHL to cyber operations.⁸⁴ Hopefully, the next decade will witness their resolution by the legal, operational and policy communities.

Notes

1. See, e.g., EUROPEAN UNION, INDEPENDENT INTERNATIONAL FACT-FINDING MISSION ON THE CONFLICT IN GEORGIA, REPORT (2009).

2. On cyber operations during the conflict, see ENEKEN TIKK, KADRI KASKA & LIIS VIHUL, INTERNATIONAL CYBER INCIDENTS: LEGAL CONSIDERATIONS 63–90 (2010).

3. Under direction of the author.

4. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 48, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

5. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 78 (July 8).

6. AP I, *supra* note 4, art. 51.2.

7. *Id.*, art. 51.4.

8. *Id.*, art. 51.7.

9. *Id.*, art. 51.5(a).

10. *Id.*, art. 51.5(b).

11. *Id.*, arts. 52.1 & 52.2.

12. *Id.*, art. 54.2.

13. *Id.*, art. 55.2.

14. *Id.*, art. 56.1. The protection extends, in specified circumstances, to “installations erected for the sole purpose of defending the protected works or installations from attacks.” *Id.*, art. 56.5.

15. *Id.*, art. 56.1. Note that Article 56 sets forth certain circumstances in which the special protection ceases. *Id.*, art. 56.2.

16. *Id.*, art. 57.1.

17. *Id.*, art. 57.2(a)(i).

18. *Id.*, art. 57.2(a)(ii).

19. *Id.*, art. 57.2(a)(iii).

20. *Id.*, art. 57.2(b).

21. *Id.*, art. 57.2(c).

22. *Id.*, art. 57.3.

23. *Id.*, art. 57.5.

24. *Id.*, art. 58.

25. *Id.*, art. 12. By reference, arts. 21 & 23.

26. *Id.*, arts. 41.1 & 42.1.

27. *Id.*, art. 44.3.

28. *Id.*, art. 59.1.

29. *Id.*, art. 49. For an example of the definition in a non-AP I treatment of the subject, see HARVARD PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, COMMENTARY ON THE HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE rule 1(e) (2009), available at <http://ihlresearch.org/amw/Commentary%20on%20the%20HPCR%20Manual.pdf> [hereinafter AMW Manual].

30. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶ 1875 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann, eds., 1987) [hereinafter AP COMMENTARY].

31. MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS 289 (1982).

32. AP COMMENTARY, *supra* note 30, ¶ 1880.

33. Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331.

34. AP I, *supra* note 4, arts. 51.1 & 51.2.

35. *Id.*, arts. 51.5(b), 57.2(a)(iii) & 57.2(b).

36. *Id.*, art. 57.2(a)(ii).

37. *Id.*, art. 57.2(c).

38. *Id.*, art. 57.3.

39. *Id.*, art. 57.4.

40. *Id.*, arts. 35.3 and 55.1.

41. *Id.*, art. 56.1.

42. BOTHE ET AL., *supra* note 31, at 288.

43. Knut Dörmann, *Applicability of the Additional Protocols to Computer Network Attacks* (Paper delivered at the International Expert Conference on Computer Network Attacks and the Applicability of International Humanitarian Law, Stockholm, Nov. 17–19, 2004), <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/68lg92?opendocument>.

44. AP I, *supra* note 4, art. 52.2.

45. Dörmann, *supra* note 43.

46. BOTHE ET AL., *supra* note 31, at 325.

47. *Id.*

48. US Navy, Marine Corps & Coast Guard, The Commander's Handbook on the Law of Naval Operations, NWP 1-14M/MCWP 5-12.1/COMDTPUB P5800.7A ¶ 8.2 (2007). Examples of war-sustaining objects include "economic objects of the enemy that indirectly but effectively support and sustain the enemy's war-fighting capability." *Id.*, ¶ 8.2.5.

49. AP I, *supra* note 4, art. 51.3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 13.3, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II]. On the customary nature of the norm, see I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW rule 6 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005); AMW Manual, *supra* note 29, rules 28–29; MICHAEL N. SCHMITT, CHARLES H.B. GARRAWAY & YORAM DINSTEIN, THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT WITH COMMENTARY rule 1.2.2 (2006).

50. NILS MELZER, INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 16 (2009) [hereinafter IG].

51. See, e.g., Bill Boothby, "And for Such Time As": The Time Dimension to Direct Participation in Hostilities, 42 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 741 (2010); W. Hays Parks, Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect, *supra* at 769 (2010); Michael N. Schmitt, Deconstructing

Direct Participation in Hostilities: The Constitutive Elements, *supra* at 697 (2010); Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance*, *supra* at 641 (2010); Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARVARD NATIONAL SECURITY JOURNAL 5 (2010).

52. AP COMMENTARY, *supra* note 30, ¶ 1672.

53. IG, *supra* note 50, at 22.

54. AP I, *supra* note 4, art. 43.2.

55. IG, *supra* note 50, at 23.

56. *Id.*

57. *Id.* at 24.

58. *Id.* at 23.

59. *Id.* at 26, 33.

60. Since a member of an organized armed group without a combat function would not be targetable, while a member of the armed forces without such a function would be subject to attack.

61. IG, *supra* note 50, at 33.

62. AP I, *supra* note 4, art. 50.1.

63. IG, *supra* note 50, at 16–17.

64. *See generally* Schmitt, *Deconstructing*, *supra* note 51.

65. *See, e.g.*, W. Hays Parks, *Air War and the Law of War*, 32 AIR FORCE LAW REVIEW 1, 118 (1990).

66. IG, *supra* note 50, at 70.

67. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 2, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC I–IV].

68. COMMENTARY TO GENEVA CONVENTION III RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 23 (Jean Pictet ed., 1960) [hereinafter GC-III COMMENTARY].

69. Prosecutor v. Tadic, Case No. IT-94-1-A, Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995). *See also* Prosecutor v. Kunarac, Case No. IT-96-23/1-A, Judgment, ¶¶ 56–57 (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2002); Prosecutor v. Milosevic, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, ¶¶ 15–17 (Int’l Crim. Trib. for the Former Yugoslavia June 16, 2004).

70. U.N. Charter art. 51.

71. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 195 (June 27). This standard has been subject to careful parsing (*see, e.g.*, Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, ¶ 72 (Nov. 6)), and criticized by commentators (*see, e.g.*, YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 194–96 (4th. ed. 2005); William Taft, *Self-defense and the Oil Platforms Decision*, 29 YALE JOURNAL OF INTERNATIONAL LAW 295, 300 (2004)).

72. AP I, *supra* note 4, art. 49; AMW Manual, *supra* note 29, rule 1(e).

73. Article 2 of the Geneva Conventions extends to cases of “partial or total occupation . . . even if said occupation meets with no armed resistance.” GC I–IV, *supra* note 67, art. 2(1). Similarly,

when the forces of a State detain individuals protected by IHL (especially members of the opponent's armed forces), an armed conflict exists. GC-III COMMENTARY, *supra* note 68, at 23.

74. Military and Paramilitary Activities, *supra* note 71, ¶ 115 (June 27). See also discussion at paragraph 109.

75. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, ¶ 160 (Dec. 19); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 91, ¶¶ 391–92 (Feb. 26).

76. Prosecutor v. Tadic, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶ 145 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999) (emphasis added).

77. The ICJ affirmed this principle in *Corfu Channel*, its first case. The Court held that every State has an "obligation to not allow knowingly its territory to be used for acts contrary to the rights of other States." *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, 22 (Apr. 9).

78. GC I–IV, *supra* note 67, "Common" art. 3.

79. AP II, *supra* note 49, art. 1.2. The limitation is generally deemed to reflect the standard applicable to Common Article 3 and in customary international law. See, e.g., Statute of the International Criminal Court art. 8(2)(f), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

80. Tadic, *supra* note 69, ¶ 70.

81. Prosecutor v. Akeyesu, Case No. ICTR-96-4-T, Judgment, ¶ 619 (Sept. 2, 1998); Rome Statute, *supra* note 79, art. 8(2)(f).

82. AP II, *supra* note 49, art. 1.1. It must also be able to implement the provisions of the Protocol.

83. The first conference on the subject was hosted by the Naval War College in June 1999. The proceedings were published as COMPUTER NETWORK ATTACK AND INTERNATIONAL LAW (Michael N. Schmitt & Brian T. O'Donnell eds., 2002) (Vol. 76, US Naval War College International Law Studies).

84. See, e.g., COMMITTEE ON DETERRING CYBERATTACKS: INFORMING STRATEGIES AND DEVELOPING OPTIONS FOR U.S. POLICY, NATIONAL RESEARCH COUNCIL, PROCEEDINGS OF A WORKSHOP ON DETERRING CYBERATTACKS: INFORMING STRATEGIES AND DEVELOPING OPTIONS FOR U.S. POLICY 151–78 (2010).

PART IV

LUNCHEON ADDRESS

VI

Who May Be Held? Military Detention through the Habeas Lens

Robert M. Chesney*

Who lawfully may be held in military custody without criminal charge? It seems a simple question, and in some settings it is. But in the settings that matter most at the moment—counterterrorism and counterinsurgency—it is not simple at all. The very metrics of legality are disputed in those contexts, with sharp disagreement regarding which bodies of law are relevant and what if anything each actually says about the detention-scope issue.

This problem has been with us for some time. It has lurked in the background of US detention operations in Afghanistan since 2001¹ and in Iraq since 2003.² It is central, of course, to the controversies surrounding the use of detention at Guantanamo and in the United States itself.³ More than one hundred thousand individuals have been detained without criminal charge across these settings,⁴ giving rise to an immense amount of scholarship, advocacy and litigation along the way. Remarkably, however, the question of who lawfully may be detained remains unsettled in important respects.

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The problem exists along two distinct dimensions, only one of which do I address in this article. First, we have indeterminacy at the *group* level insofar as there is disagreement with respect to whether any authority to use military detention that the US government may currently possess extends to any entities other than al Qaeda and the Taliban, and also insofar as there is disagreement regarding which entities are sufficiently affiliated with al Qaeda or the Taliban so as to be indistinguishable from them for purposes of this inquiry.⁵ Even if we had agreement regarding which groups are relevant for purposes of the detention issue, however, indeterminacy also manifests at the *individual* level insofar as we also lack agreement regarding the mix of conditions that are necessary or sufficient to justify the detention of a particular person. My aim in this article is to shed light solely on this individualized set of questions.

That we lack consensus with respect to individualized detention criteria and constraints despite nearly a decade's worth of litigation and debate to some extent reflects our preoccupation with other questions associated with military detention, above all the seven years' war over the habeas jurisdiction of federal courts in relation to the Guantanamo detainees.⁶ Yet even prior to the resolution of that jurisdictional dispute in the Supreme Court's 2008 decision in *Boumediene v. Bush*,⁷ courts did have several occasions to address the detention-scope issue; they just did not develop a consensus as a result. On the contrary, they splintered sharply in those cases, advancing an array of incompatible views regarding the applicable law.⁸

Matters have improved to some extent in the aftermath of *Boumediene*.⁹ Many district and circuit court judges have had a chance to address who lawfully may be detained in the context of the Guantanamo habeas litigation. Their decisions reflect a consensus that the government does have authority to detain without criminal charge in at least some circumstances, and that (at least for most of the judges) these circumstances at a minimum include at least some scenarios involving persons who are "part of" al Qaeda or the Taliban (whether the consensus extends to membership in other groups is much less clear). But beyond these points disagreement reigns.

Whether a person is "part of" a group may be an administrable inquiry in the context of a regular armed force, but it does not map easily onto scenarios involving clandestine non-State actors with indistinct and unstable organizational structures. As a result, judges who agree that members of such groups may be detained do not necessarily agree as to what conduct actually counts as membership in this context. And the judges most definitely have not reached consensus with respect to whether detention lawfully may be used in the distinct situation in which a non-member provides support to these groups. Indeed, the executive branch itself now

appears divided on the propriety of using support as a stand-alone detention predicate. Perhaps most remarkably, an apparent consensus as to the relevance of the laws of war to these questions recently came unglued, with a divided panel of the D.C. Circuit Court of Appeals declaring that the matter should turn exclusively on domestic law considerations¹⁰ and a subsequent assertion by a majority of the active judges of that court in turn declaring that assertion to be dicta.¹¹

All of which is interesting in the seminar setting, but does any of it actually matter in practice? That is not a frivolous question. By and large the merits determinations in the Guantanamo habeas cases have turned on the sufficiency of the government's evidence (or lack thereof), and not on the legal boundaries of the government's notional detention authority.¹² For better or worse, moreover, habeas jurisdiction has not (yet) been extended to overseas military detention operations involving non-citizens at locations other than Guantanamo,¹³ and thus one might be tempted to conclude that any problems resulting from the judiciary's persistent inability to resolve the detention-scope question will be confined to a finite and shrinking set of cases.

In fact, the question of who lawfully may be detained matters a great deal in actual practice. As a threshold matter, the two premises mentioned above may prove to be incorrect. Much Guantanamo habeas litigation is yet to come, and it may well be that future cases will turn on this very issue. Similarly, the precise boundaries of habeas jurisdiction have not yet been fixed; though currently jurisdiction does not extend to Afghanistan, that question remains the subject of live litigation.¹⁴ Even if those premises remain valid, however, other considerations ensure the relevance of the detention-scope question.

First, the answers judges give to this question have spillover effects beyond the immediate context of habeas.¹⁵ They overhang any other detention operations conducted under the rubric of the same underlying detention authority, regardless of whether those operations are subject to judicial review; government and military lawyers will not simply ignore judicial pronouncements regarding the scope of that authority, and may be expected to advise commanders and policymakers accordingly. By the same token, judicial decisions regarding the notional scope of detention authority may apply by extension to questions of *targeting* with lethal force in the field pursuant to that same authority, notwithstanding that targeting decisions ordinarily are not directly subject to judicial review.¹⁶ Future conflicts unrelated to 9/11 may also be impacted. The judges in the habeas litigation at times have included in their analyses interpretations of key terms and concepts from both international and domestic law—such as “direct participation in hostilities” and “all necessary and appropriate force”—that will be relevant in most if not all future armed conflicts.

Taking all of this together, we can see that the judges in the habeas litigation are not merely deciding whether to grant the writ in particular cases. They have become, for better or worse, the central US government institution engaged in the critical—and ultimately unavoidable—task of tailoring the laws governing military activity to suit the increasingly important scenario in which States classify clandestine non-State actors as strategic threats requiring a military response.

The paper proceeds in three parts. I begin at a high level of abstraction in Part I by drawing attention to two strands of debate that greatly complicate the task of determining whether particular detention criteria are forbidden, required or permitted by law: (i) disagreement regarding which bodies of law actually apply in a particular instance, and (ii) disagreement as to what a particular body of law has to say, if anything, when it comes to employing particular criteria in a detention standard.

Against this backdrop, Part II provides a comprehensive descriptive account of how judges since 2002 have addressed the question of individual detention criteria, emphasizing that which has been settled and that which remains in dispute. In brief, judges largely (though not entirely) agree that detention authority lawfully extends to persons who are functional members of al Qaeda, the Taliban or associated forces, but they do not agree as to what membership means in this setting or whether detention authority also extends to non-members who provide support to such groups. Part III concludes with a discussion of whether this lingering uncertainty truly matters (it does, on many levels) and, if so, what should be done about it (legislation, preferably).

I. Contested Metrics of Legality

Nearly a decade has passed since the United States began employing military detention without criminal charge in circumstances relating to al Qaeda and the Taliban. Nonetheless, the question of who lawfully may be held in that manner—if anyone—remains the subject of bitter disagreement.

Before examining how litigants and judges have attempted to resolve these disagreements in the habeas setting, it is worth pausing to describe why, at a high level of abstraction, the parties to these debates so often appear to be speaking past one another. There are two overarching problems that contribute to that state of affairs. First, there is disagreement at the threshold with respect to which bodies of law actually apply to this question. Should it be answered solely with reference to domestic law? Law of armed conflict (LOAC)? International human rights law (IHRL)? We might call this the “domain” debate. Second, with respect to each of these potentially applicable bodies of law, there is disagreement as to what if

anything it has to say regarding which detention predicates and constraints are necessary or permissible. We might call this the “content” debate.

I do not propose to settle the domain and content debates here, nor even to engage them in a comprehensive way. Rather, my goal simply is to orient the reader to their basic features. Combined with the typology of detention predicates and constraints provided in the preceding Part, this will equip the reader to fully appreciate the points of consensus and disagreement emerging from the habeas litigation discussed in Part II.

A. The Domain Debate: Disagreement Regarding Which Bodies of Law Apply

Which bodies of law are relevant with respect to the detention-scope question? The answer to this question of course may depend on the circumstances, and thus it may be most accurate to say that there are many answers to it rather than just one. But in any event, the candidate legal regimes include domestic law (statutory or constitutional), LOAC (or international humanitarian law) and IHRL.

1. Domestic Law

At one extreme, the question of who lawfully may be held might require solely a domestic law analysis. On this view, for example, one might first consider what the September 18, 2001 Authorization for Use of Military Force¹⁷ (AUMF) has to say about the topic—or, if you prefer, what might be gleaned from the Constitution as a direct source of detention power¹⁸—and then take note of any other limitations that might be derived from the Constitution, other statutes, or prior US caselaw. If the government’s claim of detention authority is consistent with these sources, the debate ends.

Of course, treaties are part of domestic law in the sense that the Constitution makes them supreme law of the land.¹⁹ Thus the “domestic-only” viewpoint does not necessarily exclude consideration of LOAC and IHRL instruments. Insofar as those treaties are not self-executing or have been “unexecuted” by a subsequent statute, however, some argue that they are relevant solely in a diplomatic sense.²⁰ At least with respect to IHRL instruments, moreover, the US government has long maintained the position that they simply do not apply to US government conduct occurring outside of formal US territory.²¹

In any event, the notion of a purely domestic approach to determining the legal boundaries of detention authority is no mere academic invention. As we will see in Part II below, the D.C. Circuit Court of Appeals adopted precisely this view in its January 2010 decision *Al-Bihani v. Obama*. There are, however, other models.

2. *The Law of Armed Conflict*

The second model accepts the legal rather than just the diplomatic relevance of LOAC. On this view, LOAC might matter in either of two ways, one weak and one strong. First, on the weak view, LOAC must be considered when interpreting the AUMF (or, for that matter, when interpreting the scope of authority conferred directly by the Constitution).²² Consistent with the *Charming Betsy* canon, for example, one would look to LOAC in order to flesh out the meaning of the AUMF's language "all necessary and appropriate force" as it relates to detention.²³ Alternatively, on the strong view, LOAC might be treated as a legally binding constraint in its own right, independent of the best reading of the underlying domestic source of authority.

It is not clear that the difference between the weak and strong models matters in the context of the scope-of-detention issue. The difference might matter where the underlying domestic source is so clear that there is no occasion for a LOAC-based interpretation, thus making the weak but not the strong model inapplicable. But that hardly seems to be the case here, given the relative lack of clarity of the domestic sources involved. Applied in this setting, in other words, both the weak and strong models would direct us to look to LOAC to define the scope of the government's detention authority.

All that said, LOAC is not automatically relevant in in all circumstances. It is, rather, applicable in circumstances of "armed conflict."²⁴ In order to determine LOAC's field of application, one must identify and define the scope of "armed conflict"—tasks that generate considerable disputes. Some scholars reference functional criteria involving the duration, intensity and nature of the violence at issue,²⁵ while others also emphasize the formal categorization of the asserted "enemy" in terms of its status as a "state, nation, belligerent, or insurgent group."²⁶ Even when one accepts that a state of armed conflict justifying application of LOAC exists in one particular location, moreover, there is considerable disagreement as to whether and when any resulting rules can or must be applied in relation to persons in geographically distinct locations.²⁷ Indeed, it is no exaggeration to say that the most fundamental divide separating the legal positions of the Bush and Obama administrations from the views of critics in the international law community has to do with the propositions that (i) the activities of al Qaeda rise to the level of armed conflict in places other than Afghanistan and (ii) in any event the existence of armed conflict in Afghanistan permits reliance on LOAC concepts against al Qaeda-related individuals in other locations.²⁸

3. *International Human Rights Law*

The third model tracks the second, but looks to IHRL rather than LOAC. That is to say, one can advance both a weak (interpretation-based) and strong (independent-force) model of IHRL's relevance to the scope question.

Either way, the key point of departure for debate regarding the relevance of IHRL involves the question of extraterritoriality. For present purposes, the most relevant IHRL treaty is the International Covenant on Civil and Political Rights (ICCPR),²⁹ which, as discussed below, contains language relating to detention.³⁰ Article 2 of the ICCPR provides that a member State is bound to confer ICCPR protections on persons "within its territory and subject to its jurisdiction."³¹ The United States has long construed this language literally, such that ICCPR rules govern within the United States but not elsewhere.³² Many other States (including many European allies), in contrast, construe that same language to encompass any person subject to a member State's practical control regardless of geographic location, as does the UN Commission on Human Rights (now the Human Rights Council).³³ An interpretive standoff results, with great risk of outright misunderstanding insofar as either side fails to appreciate that the other simply does not share its view.

Even if one accepts the US position regarding the geographically bounded reach of the ICCPR, however, IHRL issues might still arise. Not all detentions occur outside US territory, after all. On three occasions after 9/11, for example, the United States held persons in military custody within the United States itself.³⁴ And in the wake of the Supreme Court's *Rasul* and *Boumediene* decisions emphasizing the unique degree of US control at Guantanamo, debate may yet arise as to its status vis-à-vis the ICCPR's jurisdictional provision. In any event, treaty law is not the only possible source of an IHRL obligation. Customary international law may contain norms comparable to those found in the ICCPR. The question then becomes whether any such norm entails a comparable geographic boundary, and this in turn may require inquiry into the existence in the overseas setting of a pattern of State practice supported by *opinio juris*. The room for debate—and hence for misunderstanding—is ample.

4. *Deconfliction*

The discussion grows still more complicated once one accounts for the potential of the LOAC and IHRL models to overlap and conflict with one another. This potential overlap has occasioned an immense amount of scholarship, with some characterizing the situation as encroachment by IHRL—for good or ill—on the traditional domain of LOAC.³⁵

Here we confront the question of *lex specialis*. In brief, *lex specialis* is a choice-of-law concept in which the more specifically applicable body of law governs in the event of overlap.³⁶ Unfortunately, a variety of views exists regarding just what that concept means in practice—enough to prompt the International Law Commission to undertake an effort to clarify the question.³⁷ The US government, for its part, takes the view that LOAC constitutes *lex specialis* in all circumstances of armed conflict, such that it entirely occupies the field to the exclusion of IHRL considerations.³⁸ Some have taken a different view, treating *lex specialis* not as preempting all reference to another body of law, but rather as requiring the provisions of a competing body of law to be construed in harmony with the rules provided by the dominant body of law; IHRL, on that view, would be applicable yet would be conformed to LOAC in its particulars.³⁹ Some might argue for a third position, moreover, a rights-maximizing approach in which the controlling rule is whichever one that most advantages the rights of individuals, as opposed to advantaging the discretion of the State. One might also contend for a specificity-oriented approach in which the governing rule is, literally, whichever rule speaks with greater specificity to the fact pattern (whether it is more rights-protective or not).⁴⁰ Deconfliction of LOAC and IHRL, in short, requires resolution of a complex and entrenched debate.

As if this were not enough complexity, it is of course possible that the best answer to the relevant-body-of-law inquiry will vary depending on the circumstances. That is, it may be that in one location LOAC plainly is relevant and IHRL is not, while in other locations the reverse is true and in still another location it might be that the question turns partially or entirely on domestic law instead.

B. The Content Debate: Disagreement Regarding the Rules Themselves

Unfortunately, the opportunities for confusion and disagreement are not confined to the threshold determination of which body or bodies of law matter. Even if we had consensus on that question, an equally intransigent set of disagreements emerges within each domain when we turn to the question of what that body of law has to say, if anything, regarding the particular mix of detention predicates and constraints that a State can or perhaps must use.

Note that in the abstract there are several possible outcomes when one seeks to determine what rule a particular body of law supplies with respect to the detention-scope issue. First, the body of law may provide a determinate and discernible rule that is narrower than the scope of detention authority asserted by the government. Or the reverse may be true; the rule may permit at least as much detention authority as the government asserts. One can expect litigants to emphasize one or the other of these positions. But there are other possibilities. Most notably, it may be

that the body of law is simply indeterminate on the question of scope. In that case, an important question arises regarding the default state of affairs. Does the absence of a rule constitute an absence of affirmative authority for the government to exercise detention power? Or instead does it constitute an absence of constraint on the government's exercise of such powers? This too can be a point of disagreement. Finally, it may be that the most complete answer involves a blend of the aforementioned possibilities depending on the circumstances.

1. Domestic Law

Consider first how these possibilities map onto the domestic law sources relevant to the substantive-scope question. One might begin with the September 18, 2001 AUMF,⁴¹ which introduces a series of interpretive issues.

The AUMF does not refer expressly to detention. Of course, it also says nothing express about killing or any other particular kind of military activity. What it does authorize is the use of "all necessary and appropriate force."⁴² Thus there is a threshold question as to whether it should be read to confer any detention authority at all. In the case of citizens, moreover, that inquiry is complicated by the existence of a 1971 statute—the Non-Detention Act—providing that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress,"⁴³ as well as the Civil War-era precedent *Ex parte Milligan* in which the Supreme Court employed broad language in the course of holding that a civilian could not be subjected to a military commission trial where civilian courts were open.⁴⁴

Assuming this obstacle is overcome, the next task is to determine against whom this authority may be directed. Here, the AUMF does a bit more of the work, as it refers to "those nations, organizations, and persons" whom the President determines were responsible for the 9/11 attacks, as well as those who harbor such entities.⁴⁵ The Bush administration exercised this authority by identifying al Qaeda as the entity responsible for the attacks and the Taliban as having harbored it, the Obama administration has continued that position,⁴⁶ and there does not appear to be any serious doubt that it was appropriate to do so. Thus it seems settled that the AUMF refers at least to al Qaeda and the Taliban.⁴⁷

Even if we had consensus regarding precisely which entities fall within the scope of the AUMF, however, we would still have to grapple with disagreement at the *individual* level. The AUMF is entirely silent with respect to the mix of detention predicates and constraints that suffice to link a particular person to an AUMF-covered group, for purposes of detention or otherwise.

This is, in fact, typical of AUMFs (and declarations of war, for that matter).⁴⁸ Yet no one in prior conflicts thought such silence to be significant. Why does it matter

so much now? First, most prior conflicts involved nation-States as the enemy; hence the question of detention largely arose in relation to enemy soldiers who were both readily identifiable (through uniforms and through their overt presence on a conventional battlefield) and eager to actually be identified (in order to ensure prisoner-of-war (POW) treatment and qualification for the combatant's privilege to use force).⁴⁹ Second, even where prior conflicts involved a substantial amount of hostilities with guerrilla forces—as in Vietnam—the question of how the United States resolved any incipient detention issues simply did not receive anything remotely resembling the scrutiny that arises today (let alone litigation). Matters are otherwise in relation to the use of detention under the AUMF, to say the least, and thus the question of individualized detention predicates and constraints is far more significant than in the past.

No other domestic law sources suffice to prevent debate and disagreement on these points. Congress, for its part, has not returned to the question of scope, at least not directly. The first post-AUMF legislation to address detention in any significant way was the Detainee Treatment Act of 2005 (DTA),⁵⁰ which among other things addressed the jurisdiction of federal courts to hear challenges to individual detention decisions at Guantanamo.⁵¹ The DTA did not purport to define a substantive standard as to who may be detained, however, but rather invited the D.C. Circuit Court of Appeals to consider in particular cases whether the government's assertion of detention authority was compatible with the "Constitution and laws of the United States."⁵²

The Military Commissions Act of 2006 (MCA 2006) came closer.⁵³ It did not purport to define the category of persons subject to detention without charge under the AUMF (or otherwise). It did, however, define the personal jurisdiction of the military commission system. Specifically, it stated that commissions could try cases involving any alien constituting an "unlawful enemy combatant."⁵⁴ It defined that phrase in turn to encompass any person who is not part of a State's regular armed forces (or a militia-type group obeying the traditional conditions of lawful belligerency), and who falls into one of three categories: (i) "has engaged in hostilities . . . against the United States or its co-belligerents"; (ii) "has purposefully and materially supported hostilities against the United States or its co-belligerents"; or (iii) "is part of the Taliban, al Qaeda, or associated forces."⁵⁵

The MCA 2006 thus introduced a series of necessary and sufficient conditions to bring a person within the jurisdiction of the new war-crime trial system—conditions that were narrowed only slightly with the subsequent passage of the Military Commissions Act of 2009 (MCA 2009).⁵⁶ The MCA 2009 replaced the verbiage "unlawful enemy combatant" with the less baggage-laden phrase "unprivileged enemy belligerent."⁵⁷ It kept the criteria relating to participation in hostilities and

material support of hostilities.⁵⁸ It also kept the “part of” test, but narrowed it to pertain only to al Qaeda—thus omitting the alternative of establishing personal jurisdiction over an individual solely on the ground that he was part of the Taliban or an associated force.⁵⁹

The MCA 2006 and MCA 2009 arguably shed some light on the substantive-scope question, but for at least two reasons they do not suffice to end debate. First, neither statute actually purports to speak to that question.⁶⁰ Perhaps they nonetheless do so by implication, on the theory that the boundaries of personal jurisdiction in the military commission system must extend at least as far as the boundaries of the authority to detain without criminal charge. But it is not obvious that the two questions have such a relationship to one another; one might expect the scope of personal jurisdiction to be wider than baseline detention authority in some respects and narrower in others.

Second, the MCA criteria themselves are underspecified. In terms of predicates, the criteria include both past conduct considerations (including both personal involvement in hostilities and the provision of support to AUMF-covered groups) and an associational status test (the “part of” test). The “part of” test is not further calibrated, however, leaving considerable room for disagreement. This is an important omission given the diffused, evolving and informal organizational structure of non-State actors such as al Qaeda.⁶¹ As for potential constraints, moreover, the MCA criteria are silent with respect to considerations of geography and timing.

Complicating matters, some observers may take the position that the ambiguity of these statutes constitutes an implied delegation of authority to the executive to provide whatever further criteria may be required—and perhaps also that the executive branch is entitled to deference from the judiciary in the event that its exercise of that authority should become subject to judicial review.⁶² This too becomes a point of departure for debate, as would any claim that the Constitution itself (via some combination of Article II powers, presumably) confers some degree of detention authority independent of what may be conferred by the AUMF or any other statute. As to the latter argument, it suffices to note that the problems of ambiguity associated with the language of the AUMF surely arise in equal if not greater measure under the Article II authority rubric.

2. The Law of Armed Conflict

Assume for the sake of argument that LOAC is relevant in at least some post-9/11 circumstances involving detention. Unfortunately, it too is underspecified when it comes to individual detention predicates and constraints.

When it comes to the scope-of-detention issue, LOAC is most determinate in relation to international armed conflict—i.e., an armed conflict involving on each

side at least one High Contracting Party to the Geneva Conventions. In that traditional setting, the full range of Geneva Convention protections applies,⁶³ including a host of provisions that expressly contemplate the use of non-criminal modes of detention in military custody.

Under the Geneva Convention Relative to the Treatment of Prisoners of War (GPW), for example, we find two articles confirming that a State may hold prisoners of war in custody without charge during hostilities.⁶⁴ GPW, Article 4, moreover, provides a detailed definition as to who qualifies for POW status (and hence may be detained without much controversy). Among other things, this includes any person who

- (i) is a member of the armed forces of a party;
- (ii) is a member of an irregular unit that obeys the four conditions of lawful belligerency (having a command hierarchy, wearing a distinctive sign, bearing arms openly and obeying the laws of war); or
- (iii) is a member of regular armed forces belonging to a government that the detaining State does not recognize.⁶⁵

The central concept in each instance is membership. And as noted above, the concept of membership (or being “part of” a group) at least in some contexts can be a difficult concept to apply. Not so in this setting, however. The concept of membership in structured armed forces presents few definitional issues. The use of uniforms and the likelihood that a captured member of such a group willingly will concede such status in order to obtain the benefits of POW treatment further reinforce clarity.

When a person does *not* qualify for POW status in the context of an international armed conflict, it does not follow that he or she cannot be detained without criminal charge. On the contrary, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC) expressly contemplates a non-criminal regime of “security internment” for persons who are not POWs, but nonetheless pose a threat to security in relation to an armed conflict.⁶⁶ And while the security internment provisions of the GC are largely silent with respect to the individualized criteria for triggering this authority, the International Committee of the Red Cross’s commentaries on the GC note that this omission was intentional on the part of the drafters, who thought it best to leave the question of scope to the discretion of the detaining State—though the commentaries themselves offer the opinion that this authority might be applied, as one example, to intern individuals

based on their membership in a dangerous organization.⁶⁷ The GC framework, in short, endorses something in the nature of a generalized future dangerousness inquiry, and does not demand particular forms of prior conduct or associational status.

If the question of detention authority arose only in the context of international armed conflict, then, the existence and scope of detention authority might generate little debate. Of course we might still have debates regarding the labels to be applied to detainees, and the resulting benefits to be given them. In the event of a spy or saboteur, for example, one might debate whether the person should be treated as a POW or a security internee, or perhaps instead placed in an interstitial category for unprivileged belligerents.⁶⁸ But there would be little doubt as to the basic capacity to detain without charge given the existence of express and sweeping treaty language.

For armed conflicts that are not international in the sense described above, however, the situation is quite different. Prior to 1949, no LOAC treaty instrument purported to apply beyond the confines of an international armed conflict. The 1949 Geneva Conventions broke new ground by including a single article—so-called “Common Article 3”—imposing a handful of baseline humanitarian protections for persons in the hands of the enemy during such conflicts. Additional Protocol II subsequently expanded upon those protections (though the United States is not party to that instrument). Neither instrument explicitly confers substantive detention authority, nor does either purport to limit or deny such authority.

The resulting opportunities for disagreement are considerable. Some construe the silence as fatal for any effort to rest the existence of detention authority on LOAC, let alone to use LOAC to define the scope of that authority.⁶⁹ On that view, both authority and definitional scope must derive from other bodies of law (domestic, IHRL or both).⁷⁰ Others, however, contend that the absence of affirmative constraint is equivalent to an authorization by omission, on the theory that LOAC on the whole is best understood to be a restraining body of law.⁷¹ On this view, anything that can be done in an international armed conflict *a fortiori* can be done as well during non-international armed conflict—including use of the detention principles noted above.⁷² Alternatively, some might take the position that some form of affirmative LOAC authority is needed, and that *customary* LOAC supplies it (again by analogy to the forms recognized by treaty in the international setting).⁷³

For those drawn to either of the latter two arguments, further issues emerge. Insofar as a State seeks to bring to bear detention authority akin to the GPW-based power to detain members of the enemy armed force, for example, applying the

“membership” concept will not be a simple affair when used in connection with relatively disorganized non-State actors such as insurgencies or terrorist networks. The POW definition in GPW, Article 4 will not provide much assistance in that circumstance, predicated as it is on the assumption of an organized armed force with a command hierarchy, uniforms and the like.

Of course, a State might seek to avoid such definitional difficulties by instead analogizing to the more-sweeping detention authority associated with security internment under the GC. But the very feature that might make this attractive—the lack of any particular substantive criteria—is sure to invite objections. Such objections no doubt will be muted if the context involves sustained, large-scale, combat violence; the United States employed security internment to detain tens of thousands of individuals in Iraq over the years *following* the international armed conflict and occupation phases in 2003 and 2004, without engendering any serious objections regarding the existence and scope of its detention authority, and this pattern continues on a small scale today long after the expiration of the UN Security Council resolutions that for a time provided an ad hoc positive law blessing for this arrangement.⁷⁴ But one should expect the opposite if instead the setting involves only episodic violence of a type not as readily associated in the public’s mind with combat and an enemy “force” that is non-hierarchical or otherwise indeterminate in its structure and boundaries. In that case, arguments emerge as to whether the threshold of “armed conflict” has been crossed in the first instance⁷⁵ and, even if so, whether the broad discretion associated with the GC security internment system makes sense in the context of this particular form of violence.

3. International Human Rights Law

Though IHRL refers to a diverse array of treaties and international customary law norms, for present purposes it suffices to focus attention on one treaty and one norm in particular: the prohibition of arbitrary detention contained in Article 9 of the ICCPR.⁷⁶ Article 9 provides that all persons have a “right to liberty” and thus a State shall not deprive a person of liberty “except on such grounds and in accordance with such procedure as are established by law.”⁷⁷ That is to say, a State may not hold a person in custody at its own whim as opposed to doing so based on a claim that detention in that circumstance is authorized by law.

Or at least it may not do so ordinarily. The ICCPR also provides that in the event of a public proclamation of an emergency “which threatens the life of the nation,” States may “take measures derogating” from certain ICCPR obligations, including the prohibition on arbitrary detention.⁷⁸ Then again, the United States has not invoked the derogation option (presumably because the US government position is

that the ICCPR does not apply extraterritorially and that LOAC in any event controls over the ICCPR by virtue of the *lex specialis* principle, as discussed above).

Assuming that Article 9 is applicable, then, the question arises whether US government claims of detention authority after 9/11 might violate that norm. The US government presumably would argue that military detention conducted under the auspices of the AUMF satisfies Article 9, on the theory that the AUMF is a “law” establishing the “grounds” for such detention. In response, one might contend that Article 9 contemplates only *criminal* law as a source of detention authority, but there is substantial reason to doubt that Article 9 requires such an approach.⁷⁹

Assuming that *some* degree of non-criminal detention is compatible with Article 9 (or, if one prefers, with an equivalent customary norm against arbitrary detention), we then reach the question whether the government’s claim of some particular mix of detention predicates and constraints in some way violates IHRL. Here, however, IHRL seems not to have anything particular to say; neither the ICCPR, nor any other IHRL treaty to which the United States is a party, nor any customary norm of IHRL purports to offer a substantive definition of non-criminal detention authority.⁸⁰

II. Habeas Litigation and the Scope of the Detention Power

Against the backdrop of uncertainty described in Part I, federal courts have struggled for nine years to identify the mix of detention predicates and constraints permissibly defining the substantive scope of the government’s military detention authority at the level of the individual. The range of resulting disagreements is remarkable.

My aim in this Part is to provide a relatively comprehensive descriptive account of these doctrinal disputes. I proceed in semi-chronological fashion, beginning with the often-overlooked habeas opinions associated with the three individuals who were held as “enemy combatants” within the United States after 9/11 and then moving on to a review of the pre- and post-*Boumediene* Guantanamo habeas opinions. The survey documents considerable and persistent points of disagreement.

A. The First Wave of Detention Criteria Caselaw: *Hamdi*, *Padilla* and *Al-Marri*

For several years following 9/11, the judiciary largely was preoccupied with questions of jurisdiction, not substantive law. Most detainees were non-citizens captured abroad and held outside the United States, after all, and as a result did not have a clearly established right to seek judicial review until the Supreme Court conclusively resolved that question in its 2008 decision in *Boumediene v. Bush*. Nonetheless, judges did have occasion to address the matter of individual detention

predicates and constraints in a handful of cases in the pre-*Boumediene* era, including a trio of cases involving detainees held in the United States (one originally captured in a combat setting abroad, and two captured in the United States itself).

1. The Scope of Detention Authority in Relation to Conventional Battlefield Captures Involving the Taliban

The sole post-9/11 instance in which the Supreme Court of the United States has addressed the substantive-scope issue to any serious extent is *Hamdi v. Rumsfeld*, in which a majority of the Court concluded that (i) associational status—in particular, serving as an arms-bearing member of a Taliban military unit—sufficed as a detention predicate at least where the detention occurred on the field in Afghanistan and while combat operations continue in that location, and (ii) being a US citizen does not exempt a person from being subject to such detention authority.

Yaser Hamdi had come into US custody in Afghanistan after being captured by Northern Alliance forces in the fall of 2001. The United States initially believed that Hamdi was a citizen of Saudi Arabia, but learned after bringing him to Guantanamo that he had been born in Louisiana and hence could claim to be a US citizen as well. As a result he was moved to a detention facility inside the United States, and he no longer faced the jurisdictional hurdles then preventing other Guantanamo detainees from obtaining habeas review.

Hamdi's case presented a relatively easy fact pattern from the viewpoint of the substantive-scope issue. He was not alleged to be an al Qaeda member or associate, and he was not captured in circumstances seemingly unrelated to conventional armed conflict. Rather, the government claimed, he was an arms-bearing fighter for the Taliban who had been captured with his unit and his weapon while fleeing the battlefield in Afghanistan. Hamdi denied that this was true, but for present purposes the important point is that the allegations cleanly presented the question whether a person meeting that description lawfully could be held without criminal charge.

The fact pattern actually posed two distinct substantive-scope questions. First, did the government have authority to detain *any* person in this situation—i.e., bearing arms for the Taliban in Afghanistan? Second, if the government did have such authority as a general proposition, would the answer change if the person happened to be a US citizen? The Supreme Court splintered in response to these questions.

A plurality of the Court in an opinion by Justice O'Connor upheld both the government's notional assertion of *some* authority to detain, as well as its claim that such authority extended at least to Hamdi's alleged circumstances—and Justice Thomas provided a fifth vote for these conclusions in a separate opinion.⁸¹ To begin with, the

plurality framed the issue as turning on a question of domestic law informed by reference to international law—i.e., the plurality focused on the meaning of the AUMF as construed in light of the law of armed conflict.⁸² As to the existence of *some* authority to detain, no treaty-based detention provision appeared directly applicable; Hamdi was not held as a prisoner of war or security internee, and the conflict in Afghanistan by 2004 no longer appeared to be an international armed conflict in any event. Nonetheless, the plurality concluded that detention was a traditional “incident” of warfare and thus, presumably, a necessary part of whatever body of customary LOAC principles might govern in this setting.⁸³ As for *who* precisely might be detained as a result, the plurality concluded that detention authority at least extended to persons who engaged in a particular combination of past conduct and associational status: bearing arms as part of a Taliban military unit in Afghanistan.⁸⁴ Emphasizing that the point of military detention is preventive incapacitation, moreover, the plurality expressly rejected the idea that detention might be justified on the collateral ground that a person may possess useful intelligence.

The plurality pointedly did not express any view as to the existence or scope of detention authority in other settings. It did not say whether detention authority extended beyond the Taliban to al Qaeda. It did not address the power to detain persons captured outside of Afghanistan, or persons who did not literally bear arms on a conventional battlefield. It merely observed that the “legal category of enemy combatant has not been elaborated upon in great detail,” and that the “permissible bounds of the category will be defined by the lower courts as subsequent cases are presented to them.”⁸⁵ The plurality did caution, however, that its “understanding is based on longstanding law-of-war principles,” and that “[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel.”⁸⁶

2. The Scope of Detention Authority in Relation to Domestic Captures Involving al Qaeda

The *Hamdi* decision left open more questions than it answered. What conduct other than bearing arms on the battlefield might count as membership in an AUMF-covered group justifying detention? Would membership continue to be sufficient if a person were to be captured outside Afghanistan, or if the linkage was to al Qaeda rather than the Taliban? Could conduct aside from membership—especially providing material support—provide an independent sufficient condition for detention in any location?

The cases of Jose Padilla and Ali Salah Kahleh al-Marri provided an early opportunity to address some of these loose ends. Unlike Guantanamo detainees, but like

Yaser Hamdi, both were in a position to seek habeas review with little in the way of jurisdictional disputes. Padilla was an American citizen captured in Chicago and eventually taken into military custody on the ground that he was an al Qaeda sleeper agent who had come back to the United States to assist or even personally participate in terrorist attacks. Al-Marri, a Qatari citizen, likewise was arrested inside the United States and then later transferred to military custody based on his alleged role as an al Qaeda sleeper agent. Neither, it initially appeared, was directly connected to the conventional battlefield in Afghanistan or to the Taliban.

The Padilla litigation moved forward quickly. Indeed, the substantive detention authority question was before Judge Michael Mukasey of the Southern District of New York by December of 2002.⁸⁷ As an initial matter, he found that the President had general authority to use military force against al Qaeda as a result of both the AUMF and Article II of the Constitution, and that the substantive scope of the resulting detention authority could be determined at least in part by reference to LOAC (at least insofar as LOAC takes the form of treaties to which the United States is a party, such as GPW).⁸⁸ LOAC, Judge Mukasey concluded, permits the detention without charge of persons who qualify as either lawful or unlawful combatants.⁸⁹ He did not elaborate the conditions necessary to show that a person fits into one or the other category; that is, he did not specify whether lawful and unlawful combatancy turns on conduct, status or both. He did, however, expressly reject the notion that Padilla should be exempt from detention simply because he was a citizen or because he was captured within the United States, and he implicitly rejected the notion that detention authority extends only to persons who actually bore arms on a conventional battlefield.⁹⁰

Padilla appealed, and in late 2003 prevailed in a decision from a divided panel of the Second Circuit.⁹¹ For Judges Pooler and Parker, the critical facts were Padilla's status as a citizen and his arrest within the United States—i.e., away from a conventional battlefield.⁹² In that specific scenario, they concluded, the Constitution requires that any power to detain be conferred expressly by statute, not implicitly.⁹³ The AUMF, in this view, lacked sufficient clarity.⁹⁴

This set the stage for Supreme Court review, or so it appeared. In the end, however, the Court avoided the issue. In an opinion issued simultaneously with the Court's *Hamdi* ruling, the Court held that the petition in Padilla's case should have been filed in South Carolina (the state in which Padilla was held at the time he filed) rather than in New York (the state in which he initially had been held).⁹⁵ Litigation thus had to begin anew at the district court level.

On remand to the District of South Carolina, Judge Floyd adopted the Second Circuit's view that detention authority did not apply to an American captured in the United States (absent a clear statement from Congress of its intention to convey

such authority), and then added an additional reason to believe Padilla in particular could not be detained.⁹⁶ The phrase “all necessary and appropriate force” in the AUMF, he argued, should be construed rather literally; any exercise of force must be “necessary” in the strict sense that no adequate *non*-military alternative is available. Padilla could not be detained militarily, on this view, because he could be (and indeed for a time had been) incapacitated instead through the civilian criminal justice system.⁹⁷

A few months later, a Fourth Circuit panel reversed, albeit on somewhat unexpected grounds.⁹⁸ Referencing the *Hamdi* plurality opinion, Judge Luttig explained that the ultimate question is whether the AUMF, as construed in light of LOAC, confers detention authority in a particular case.⁹⁹ *Hamdi* had settled the point as to a Taliban member captured in the field in Afghanistan, whereas the Padilla litigation had seemed to present the question whether the same result obtained for an al Qaeda member captured far from conventional combat. But as restated in the Fourth Circuit’s opinion, Padilla’s fact pattern looked much more like that in *Hamdi* after all. Padilla, Judge Luttig emphasized, had received military training at an al Qaeda facility in Afghanistan and was present there as part of an armed al Qaeda unit serving the Taliban at the time of the US military intervention after 9/11.¹⁰⁰ The only notable difference between *Hamdi* and Padilla, in this view, was that the latter managed to evade capture until far from the battlefield.¹⁰¹ This was no reason to deny the government’s detention authority in the panel’s view, even when the capture occurred within the United States.¹⁰²

Once more the stage seemed set for Supreme Court review. What would have occurred next remains a mystery, however, as the government soon transferred Padilla back to civilian custody in order to prosecute him in Florida. The move precipitated criticism in some quarters, and prompted a manifestly unhappy Judge Luttig to vacate his earlier opinion on the merits. Nonetheless, Padilla’s special role as the vehicle for fleshing out the substantive law of detention had come to an end. Going forward, it seemed that it would be the contemporaneous al-Marri litigation that tested the boundaries of detention authority.

Like Padilla, Ali Salah Kahleh al-Marri initially pursued habeas relief in the wrong jurisdiction, and as a result no judge addressed the merits in his case until 2005.¹⁰³ Eventually he refiled his petition in South Carolina, and like Padilla his case came before Judge Floyd. As noted above, Judge Floyd in early 2005 had construed the AUMF not to provide detention authority in Padilla’s case, and since his opinion addressing the same issue in al-Marri’s case came down just a few months later—before the Fourth Circuit reversed Judge Floyd’s *Padilla* ruling—al-Marri no doubt expected a similar result. But it turned out otherwise. Judge Floyd drew a sharp distinction between citizens such as Padilla and non-citizens such as al-Marri,

notwithstanding the latter's lawful residence in the United States.¹⁰⁴ Citizenship, on this view, had been not just an important but a necessary condition of Judge Floyd's earlier, strict reading of the AUMF. For non-citizens, Judge Floyd would insist on neither express statutory language conferring detention authority nor a strict reading of "necessity" such that military detention is not available when criminal prosecution suffices as an alternative.¹⁰⁵ Judge Floyd's *Al-Marri* opinion thus emerged alongside that of Judge Mukasey in *Padilla* as broad endorsements of detention authority away from the conventional battlefield.

Approximately one year later, a divided panel of the Fourth Circuit yet again reversed.¹⁰⁶ The panel majority, written by Judge Motz, framed its analysis, at least at the outset, in terms of a domestic law consideration that would not necessarily apply to non-citizens captured outside the United States. Specifically, Judge Motz emphasized that al-Marri, though a non-citizen, was lawfully present in the United States at the time of his arrest and hence able to invoke the protections of the Fifth Amendment Due Process Clause.¹⁰⁷ The manner in which she elaborated the meaning of the Fifth Amendment in this context, however, had sweeping implications for the scope of the government's detention power even in other settings. The Fifth Amendment, she explained, generally precludes detention other than pursuant to criminal conviction, subject only to a fixed number of narrowly defined exceptions.¹⁰⁸ One such exception is the power to detain an enemy combatant during war,¹⁰⁹ and the boundaries of that category must be ascertained by reference to LOAC.¹¹⁰ The court's analysis of the Fifth Amendment issue thus became a vehicle for staking out a position regarding LOAC's general approach to the substantive-scope issue—a position that would carry implications for any detention carried out under color of LOAC, regardless of whether the detainee had Fifth Amendment rights or access to judicial review.

What precisely did the panel conclude with respect to LOAC's treatment of the detention question? The opinion began by asserting that LOAC "provides clear rules for determining an individual's status" as either a "combatant" or a "civilian" in the context of international armed conflict. The panel asserted that civilians were categorically immune from military detention without criminal charge, failing to account for the security internment regime provided in the GC.¹¹¹ LOAC, the panel concluded, contemplated detention solely for combatants.

As to who constituted a combatant, the panel looked to GPW, Article 4, which defines eligibility for POW status.¹¹² That is to say, the panel equated eligibility for detention with eligibility for POW status, adding that LOAC treats as "combatants" only those who fight for the military arm of a nation-State, not just any armed group.¹¹³ Indeed, the panel added, there simply was no such thing as "combatant"

status—and hence no LOAC-based detention authority—outside the context of international armed conflict.¹¹⁴

This was fatal to the attempt to detain al-Marri. Hamdi had been detainable in theory because of his alleged affiliation with the military arm of the Taliban, with the Taliban functioning as the *de facto* government of Afghanistan. Padilla's eligibility ultimately rested on the same ground (according to the Fourth Circuit at least, even if not Judge Floyd).¹¹⁵ Al-Marri, in contrast, was a "mere" al Qaeda member with no alleged prior role as a *de facto* Taliban battlefield fighter. At most he was someone associated with the enemy in a *non*-international armed conflict in which there simply was no LOAC-based detention authority. No al Qaeda member could be detained, on this view, absent the coincidence of having been in the field in Afghanistan in a context that could be described as bearing arms for the Taliban—whether later captured in the United States or not.

But the al-Marri litigation was not over. The government successfully sought *en banc* review, resulting in a reversal of the panel by a narrow margin—and a profound splintering of opinion regarding the substantive bounds of the government's detention authority.¹¹⁶ Four judges, in a new opinion by Judge Motz, endorsed the panel's original rationale.¹¹⁷ Five other judges disagreed, albeit for different reasons.

Judge Traxler, in an opinion joined in relevant part by Judge Niemeyer, concentrated on the language of the AUMF itself, and in particular on its reference to the use of force against "organizations" as well as "nations" found to be linked to the 9/11 attacks.¹¹⁸ In their view, the AUMF reflects a legislative intent to permit military force against al Qaeda, above all.¹¹⁹ They did not dispute that LOAC defined limits on how such force might be employed, but rejected the panel's conclusion that LOAC permitted detention only when dealing with members of the military arm of an actual nation-State.¹²⁰

Judge Williams, in a separate opinion joined by Judge Duncan, offered a view that was simultaneously broad and narrow. Like Judge Traxler, Judge Williams rejected the claim that the detention authority conferred by the AUMF should be read to apply only to members of the military arm of a government. But whereas Judge Traxler suggested that LOAC imposed no such limitation, Judge Williams accepted that the panel's approach "may very well be correct" as a statement of LOAC; he simply did not think that any such LOAC-based restraints survived the AUMF's explicit reference to the use of force against "organizations" as well as "nations" linked to the 9/11 attacks.¹²¹ Interestingly, however, Judge Williams in another sense did define detention authority narrowly. Rather than refer to mere membership in or association with an enemy force as sufficient to justify detention under the AUMF, he advanced a conduct-based criterion: one must "attempt[] or

engage[] in belligerent acts against the United States” on “behalf of an enemy force” in order to be subject to detention on this model.¹²² Further complicating matters, moreover, Judge Williams (somewhat inconsistently) held open the possibility that detention authority might *not* continue to exist when the United States was no longer engaged in conventional combat operations in Afghanistan.¹²³

Then we have the distinctive opinion of Judge Wilkinson.¹²⁴ His analysis began relatively conventionally, exploring whether the AUMF on its own terms plausibly could be read to limit detention authority to members of government-sponsored armed forces or persons who literally fought on a conventional battlefield.¹²⁵ Neither its broad terms nor the legislative intent giving rise to it could be squared with such limits, he concluded.¹²⁶

Next, Judge Wilkinson considered whether the broad scope of detention authority seemingly conferred by the AUMF could be reconciled with any applicable constitutional limitations given that al-Marri had been lawfully resident in the United States.¹²⁷ Citing *Hamdi*, Judge Wilkinson observed that the government constitutionally may detain persons who count as “enemy combatants.”¹²⁸ The task at the heart of the constitutional inquiry, therefore, was to identify the contours of the “enemy combatant” category.¹²⁹ Toward that end, Judge Wilkinson reasoned that one must look to “traditional law of war principles.”¹³⁰ LOAC was “not binding of its own force,” he cautioned. But it mattered nonetheless because it “informs our understanding of the war powers in Articles I and II and of the enemy combatant category.”¹³¹

Having clarified his motivation for doing so, Judge Wilkinson proceeded to a lengthy discussion of LOAC’s treatment of the detention question.¹³² In accord with Judge Motz—and likewise without reference to the security internment framework in the GC—Judge Wilkinson accepted that LOAC permitted detention without criminal charge solely for combatants, not for civilians.¹³³ He differed sharply from Judge Motz, however, with respect to the scope of the combatant category. Whereas Judge Motz effectively equated combatancy with eligibility for POW status, Judge Wilkinson accepted the government’s contention that some individuals lose their eligibility for POW status by flouting LOAC yet nonetheless remain “combatants” subject to targeting and detention.¹³⁴ On that view, POW status is not the measure of combatancy, nor was any “single factor” a necessary or sufficient condition to establish that status.¹³⁵ The most one could say, Judge Wilkinson argued, was that the category “traditionally included ‘most members of the armed forces’” as well as “those ‘who associate themselves with the military arm of the enemy government,’”¹³⁶ and that key indicia included self-identification through the wearing of uniforms, involvement in the command structure of a party to the conflict or presence on the battlefield.¹³⁷

At this point in his analysis, however, Judge Wilkinson introduced a distinguishing proposition: that LOAC is evolving in the face of asymmetric warfare and mass-casualty terrorism, bringing with it corresponding change to the concept of combatancy.¹³⁸ He expressly embraced the proposition that law and strategic context exist in dynamic relationship,¹³⁹ and argued that LOAC in particular had “consistently accommodated changes in the conduct of war and in international relations.”¹⁴⁰ In our own era, he observed, war was becoming “less a state-based enterprise,” with the diffusion of destructive technologies enabling super-empowered non-State actors to pose a strategic threat to States.¹⁴¹ “Thus,” he concluded, “while the principle of discrimination and the category of enemy combatant surely remain a vital part of the law of war, they most definitely must accommodate the new threats to the security of nations.”¹⁴²

All of which raised two questions. Precisely how should LOAC evolve? And through which institutional mechanisms should such evolution be effectuated or recognized?

As to the latter point, Judge Wilkinson contended that the elected branches of the government already had expressed their opinion of the matter by expressly including “organizations” in addition to States in the AUMF’s text. But he also stated at the outset of the opinion that the time had come to “develop” a new, tailored legal framework to accommodate LOAC to the evolving strategic climate,¹⁴³ and he proceeded at this point in his analysis to offer his own perspective as to how best this could be done.¹⁴⁴ Going forward, he argued, the inquiry into combatant status ought to turn on a three-step inquiry: a combatant is a person who is

(1) . . . a member of (2) an organization or nation against whom Congress has declared war or authorized the use of military force, and (3) [who] knowingly plans or engages in conduct that harms or aims to harm persons or property for the purpose of furthering military goals of the enemy nation or organization.¹⁴⁵

The Wilkinson test, in short, combines a membership inquiry with a conduct test, thus arriving at a result not unlike that advanced by Judge Williams. As to membership, Judge Wilkinson conceded that identifying a sufficient degree of association with a non-State actor would be more difficult than, say, ascertaining citizenship.¹⁴⁶ Nonetheless, he argued, the concept could be measured with reference to criteria such as “self-identification with the organization through verbal or written statements; participation in the group’s hierarchy or command structure; or knowingly taking overt steps to aid or participate in the organization’s activities.”¹⁴⁷ As for the additional requirement of involvement in hostile conduct, Judge Wilkinson suggested that this criterion would encompass both those who

literally engage in hostilities and those who merely engage in preliminary steps toward such acts (as with a “sleeper cell”), but that it would not also reach the members of an enemy organization otherwise (and hence would not encompass an al Qaeda doctor, for example).¹⁴⁸

The net result of the Traxler, Williams and Wilkinson opinions was a five-vote majority rejecting the proposition that the AUMF conferred detention authority solely as to those who fought for the armed forces of a government or those who had fought on a conventional battlefield. The five-vote block did not agree, however, with respect to whether membership in a non-State organization such as al Qaeda must be joined with hostile individual conduct in order for detention authority to attach, and it was unclear what the four-vote block associated with the opinion of Judge Motz might think of that proposition.

The al-Marri litigation would shed no further light on these questions. The Supreme Court did grant *certiorari* in the case, but as had happened with Padilla previously, the government at that point mooted the case by transferring al-Marri to civilian custody to face criminal prosecution—prompting the Supreme Court to vacate the Fourth Circuit’s judgment and remand the case to be dismissed as moot.¹⁴⁹ Thus ended the last of the suits challenging the government’s detention authority in the exceptionally complicated—and exceptionally uncommon—context of US citizen detainees and other persons captured inside the United States.

Some things seemed to have been settled along the way, others not. The judges uniformly agreed that the AUMF conferred *some* detention authority, including at least the authority to reach Taliban fighters—even US citizens—captured on the battlefield in Afghanistan. Beyond this, however, the judges disagreed sharply. Some rejected the proposition that the authority could extend to al Qaeda-linked individuals, while others took the contrary view. Among those accepting that detention authority could extend to the context of al Qaeda-related captures, some thought membership in al Qaeda a sufficient condition for detention, while others argued that membership was necessary but not sufficient, and that some showing of knowing conduct associated with violence was also required. Among those who found membership sufficient or at least relevant to the analysis, moreover, there was relatively little discussion of just what the indicia of membership in a non-State actor like al Qaeda might be. None of the judges, finally, had occasion to address the scenario in which a person was not a member of an AUMF-covered group but had provided material support to one.

B. The Second Wave of Detention Criteria Caselaw: The Guantanamo Cases

The end of domestic-detention litigation did not mean that courts going forward would have no further opportunity to consider these debates. The same questions

of course arise in relation to the vastly more frequent scenario in which the military has detained non-citizens captured and held overseas.

1. Contesting the Substantive Scope of Detention Authority in Boumediene

Between the opening of detention operations at Guantanamo in January 2002 and the summer of 2004, the ability of non-citizens held there to obtain judicial review via habeas corpus was sharply contested. That contest ended for a brief period in June 2004, however, when the Supreme Court in *Rasul v. Bush* held that the federal habeas corpus statute conferred jurisdiction as to the claims of the Guantanamo detainees. Not long thereafter, Congress enacted the first of two statutes designed in part to overturn the statutory holding in *Rasul*, thus reviving the debate over jurisdiction that stood between the Guantanamo detainees and judicial consideration of any merits issues they might present—including arguments about the legal boundaries of detention authority.¹⁵⁰ Yet in the months before Congress acted, habeas litigation had moved forward in federal court in Washington, D.C., with two cases proceeding to the merits.

Ultimately, these cases would come together in the Supreme Court under the name *Boumediene v. Bush*. At the district court level, however, they remained quite distinct. One came before Judge Leon, who resolved the petition in the government's favor without addressing the substantive scope of the government's detention authority.¹⁵¹ The other came before Judge Green, who took the contrary view.

In a January 2005 decision titled *In re Guantanamo Detainee Cases*, Judge Green concluded that the detainees held at Guantanamo were entitled to the protections of the Fifth Amendment notwithstanding their status as non-citizens captured and held outside the United States.¹⁵² This of course raised constitutional questions regarding the actual process the detainees had been afforded. But it also raised a constitutional question regarding the substantive scope of detention authority asserted by the government in the following sense.¹⁵³ One group of detainees in the litigation had argued that the Fifth Amendment precludes detention “based solely on . . . membership in anti-American organizations rather than on actual activities supporting the use of violence or harm against the United States.”¹⁵⁴ Judge Green agreed, writing that it would violate due process if the government were to hold a person “solely because of his contacts with individuals or organizations tied to terrorism and not because of any terrorist activities that the detainee aided, abetted, or undertook himself.”¹⁵⁵ In that respect, Judge Green's opinion was akin to the view expressed by Judge Wilkinson in *Al-Marri*; for both judges, detention could not be predicated on membership alone, but must include some showing of

knowing involvement in violent activities (though not necessarily direct participation in violence).¹⁵⁶

It would be some time before another judge would address the substantive scope of detention authority in the context of a Guantanamo habeas claim. By the time the decisions by Judges Leon and Green were before the D.C. Circuit Court of Appeals, Congress had enacted the Detainee Treatment Act, which purported to eliminate statutory habeas jurisdiction—thus reviving the pre-*Rasul* jurisdictional debate, albeit with a twist. Instead of eliminating all judicial review, the DTA created an exclusive mechanism pursuant to which the D.C. Circuit Court of Appeals could review individual detention decisions at Guantanamo in order to determine whether the military's screening system complied with the "Constitution and laws of the United States" and whether the military had actually complied with its own screening rules in a particular case. This model appeared to leave the D.C. Circuit in a position to consider the legal boundaries of the government's detention authority, but at the same time the DTA appeared to eliminate the habeas review system that had provided Judge Green the occasion for her ruling.

Several detainees—including many of the individuals involved in the cases before Judges Leon and Green—argued that this arrangement was unconstitutional, reasoning that the Constitution required the existence of habeas corpus jurisdiction at Guantanamo and that the D.C. Circuit review alternative was not an adequate substitute. That much is widely appreciated, as their arguments did ultimately prevail in *Boumediene*. Many are not aware, however, that these litigants simultaneously pressed the substantive question of who lawfully may be detained, and that this question was briefed and argued to the Supreme Court alongside the jurisdictional issue.

The lead petitioners in *Boumediene* did not focus their arguments on Judge Green's determination that the Due Process Clause required a conduct-based rather than a membership-based test for detainability.¹⁵⁷ Instead, they concentrated on LOAC-based arguments that would constrain the government's detention authority irrespective of whether a particular detainee could claim Fifth Amendment protections. Their argument began with the premise that LOAC defined the outer boundaries of whatever detention authority the United States had.¹⁵⁸ Next, the petitioners argued that LOAC does not recognize combatant status in relation to armed conflicts between States and non-State actors; in that setting, they contended, everyone counts as a civilian.¹⁵⁹

One might have expected them to stop at this point, echoing the view of Judge Motz in the *Al-Marri* panel decision to the effect that civilians simply are not subject to military detention. But they did not do so. On the contrary, they conceded

that some civilians could indeed be detained consistent with LOAC.¹⁶⁰ But which ones?

The petitioners invoked the “direct participation in hostilities” (DPH) test, arguing that any civilian could be detained to the extent that he or she had engaged in DPH.¹⁶¹ DPH is a LOAC principle associated with the question of who may be targeted with lethal force, reflecting the notion that whereas a “combatant” may be targeted at all times so long as not *hors de combat*, a “civilian” may never intentionally be targeted unless that person is engaged in DPH. DPH is not, in other words, a concept traditionally associated with detention authority. Nonetheless, in the context of a non-international armed conflict involving a clandestine network the members of which sought to obscure their identity, the idea of using DPH as a sorting standard had a certain appeal as a limiting principle for detention authority. From this point of view, their argument was rather in the spirit of Judge Wilkinson’s effort to craft a more-tailored understanding of “combatant” for use in the same setting, except that in this case the argument was framed as a description of what LOAC *already* requires as a binding rule of international law in this context.¹⁶²

Even assuming the Supreme Court was amenable in principle to using the DPH standard as the measure of detainability, a problem remained. Famously, the precise meaning of DPH is the subject of fierce and protracted disagreement.¹⁶³

The petitioners would have to tread carefully in crafting their position on this point. If they pushed for too narrow a definition, they might alienate those members of the Court inclined to recognize a relatively broad amount of detention authority. If they advanced too broad a conception, on the other hand, they might confirm their own detainability. Ultimately, and perhaps surprisingly, they erred on the side of a broad definition.

As an initial matter, they conceded that immediate personal involvement in conventional battlefield-type actions counts as direct participation.¹⁶⁴ That much is common ground for most, if not all, participants in the larger DPH debate. They did not stop there, however. They also endorsed the view that a person can be deemed perpetually engaged in DPH—in effect, waiving the protections of civilian status—insofar as he engages in DPH on a repeated basis (a position rather like the “continuous combat function” theory of DPH advanced by the International Committee of the Red Cross, among others).¹⁶⁵ The petitioners added that this status would extend to leadership figures in al Qaeda, moreover, and most remarkably of all they suggested it might even extend to those actual members of al Qaeda who are subject to the group’s direction and control.¹⁶⁶ In short, the petitioners offered a test that would leave the government with a substantial amount of detention—and targeting—authority, while excluding those who at most provide

support on a relatively independent basis to al Qaeda or the Taliban (presumably the petitioners reasoned that the government at most could prove them to be in the latter category).¹⁶⁷

Notwithstanding this invitation, the Supreme Court in *Boumediene* ultimately chose to say nothing at all about the question of detention standards, neither endorsing nor rejecting Judge Green's objection to membership-based detention or the *Boumediene* petitioner's DPH-based argument.¹⁶⁸ All of this instead would be left for the district courts to sort out in the coming wave of habeas litigation.

2. Contesting the Substantive Scope of Detention Authority after Boumediene

Much has occurred in the Guantanamo habeas litigation during the two and a half years since the Supreme Court's decision in *Boumediene*. The federal district court in Washington, D.C. has resolved the merits in habeas cases involving forty individual Guantanamo detainees, finding for the government in nineteen instances and for the detainee in twenty-one.¹⁶⁹ Many of these rulings have been or may yet be appealed. Of the nineteen cases won by the government at the district court level, the D.C. Circuit has reached the merits in five, affirming in four instances and reversing and remanding for further consideration in one other.¹⁷⁰ Of the twenty-one cases won by the detainee at the district court level, the D.C. Circuit has reached the merits in two, reversing with instructions to deny the writ in one instance¹⁷¹ and reversing and remanding for further consideration in another.¹⁷² Many of these appellate decisions are themselves now the subjects of unresolved petitions for certiorari, and so the circumstances remain in flux.¹⁷³

In addition to all of this, the D.C. Circuit Court of Appeals very shortly after *Boumediene* held that the government lacked authority to detain a group of seventeen Chinese Uighur detainees, because their alleged affiliation with the East Turkistan Islamic Movement did not bring them within the scope of the AUMF.¹⁷⁴ That ruling came under the auspices of the DTA, rather than the habeas corpus review mandated weeks earlier by *Boumediene*,¹⁷⁵ but the result in any event was a defeat for the government.

For the most part, these decisions have turned on evidentiary issues. That is, they turn on questions such as whether and to what extent to credit certain kinds of evidence, and above all whether the collective impact of the government's evidence suffices in a particular case to prove by a preponderance of the evidence that a detainee is who the government claims him to be.¹⁷⁶ But along the way, the judges have had several occasions to grapple with the substantive-scope questions left open by the combination of *Hamdi*, *Padilla*, *Al-Marri* and *Boumediene*. Perhaps predictably, they have disagreed on several key points.

The first section below surveys a handful of conflicting cases considering whether future dangerousness should be treated as a necessary condition for detention. For the time being at least, the answer to that question is no. The next section takes up a line of cases illustrating a strong consensus to the effect that membership counts as a sufficient condition for detention, but also revealing considerable disagreement both as to the actual meaning of membership and whether support independent of membership can serve as an alternative sufficient condition.

a. Rejecting Personal Dangerousness as a Necessary Condition. On April 15, 2009, Judge Ellen Huvelle held in *Basardh v. Obama* that the government may not continue to hold anyone in custody, regardless of whether he or she was a member or supporter of a relevant group at the time of capture, where the person is not likely to “rejoin the enemy” if released.¹⁷⁷ The September 18, 2001 AUMF “defines the Executive’s detention authority in plain and unambiguous terms,” she asserted, and “does not authorize the detention of individuals beyond that which is necessary to prevent those individuals from rejoining the battle”¹⁷⁸ Reasoning that Basardh had no prospect of rejoining any enemy of the United States as a result of “widespread public disclosure” of his cooperation with American interrogators, Judge Huvelle concluded that he must be released.¹⁷⁹

This approach amounts to the imposition of a particular kind of “future dangerousness” condition, above and beyond whatever criteria might be required to justify detention in the first instance. It did not prove popular, however, among other judges. Two district judges explicitly rejected this aspect of *Basardh*,¹⁸⁰ and more significantly the D.C. Circuit eventually did the same.¹⁸¹ For the time being, then, this aspect of the substantive-scope issue has been settled.

b. Contesting Membership and Support as Sufficient Conditions. The bulk of the post-*Boumediene* cases dealing with the substantive-scope question have focused on the role of membership and independent support as sufficient conditions for detention. Notwithstanding earlier claims to the contrary by Judge Green in *In re Guantanamo Detainee Cases* and Judge Wilkinson in *Al-Marri*, these opinions reflect widespread agreement among the judges that associational status alone—i.e., membership in an AUMF-covered group—can serve as a sufficient condition to justify detention. Consensus breaks down, however, when it comes to fleshing out the meaning of membership, and likewise when it comes to determining whether independent support—i.e., the provision of material support to an AUMF-covered group by a non-member—can serve as an alternative sufficient condition.

These issues arose initially before Judge Leon, presiding over the merits hearing for the *Boumediene* petitioners themselves on remand from their Supreme Court victory.¹⁸² In October 2008, he issued an opinion characterizing both the petitioners and the government as having urged him to “draft” his own preferred legal standard regarding the boundaries of detention authority.¹⁸³ This he refused to do, arguing that his role instead was merely to determine whether the administration’s position was consistent with a pair of *domestic* legal considerations: the AUMF, and any further authority the President might have under the “war powers” of Article II of the Constitution.¹⁸⁴ Without substantial elaboration, Judge Leon concluded that the government’s two-track standard was compatible with both.¹⁸⁵

There things stood when the Obama administration came into office in early 2009. On the second day of his administration, President Obama initiated a major review of detention policy by giving an interagency task force six months to assess the full range of options associated with the capture, detention, trial and disposition of persons in the context of combat and counterterrorism operations.¹⁸⁶ But litigation deadlines pay no respect to plans for carefully paced policy deliberations, particularly not when years of jurisdictional litigation precedes the merits. Long before the mid-2009 deadline for completion of the interagency review, the administration was obliged to make clear not only whether it intended to defend its authority to employ military detention without criminal charge at Guantanamo, but also what substantive detention standard it believed it had a right to invoke.

It did this on March 13, 2009, when the Justice Department’s Civil Division filed a brief before Judge Bates in the *Hamli* litigation. To the surprise of some, the Obama administration continued to assert authority to detain without charge, and to do so pursuant to a standard not much different from the Combatant Status Review Tribunal standard of the Bush administration. To be sure, it eschewed the baggage-laden nomenclature of “unlawful enemy combatant” in favor of an acronym-less, generic reference to those persons subject to detention pursuant to the September 18, 2001 Authorization for Use of Military Force. And it also expressly embraced the relevance of LOAC for purposes of defining the particulars of that authority. Those particulars turned out to be much the same as before, however, including preservation of the two-track approach encompassing either members or supporters of al Qaeda, the Taliban or associated groups. The only substantive difference was the qualification—or clarification—that independent support must be “substantial” in order to trigger eligibility for detention, thus eliminating any argument that *de minimis* support might suffice to support detention.

Before Judge Bates had the chance to address the merits of the revised position in *Hamli*, Judge Walton did so in *Gherebi v. Obama*.¹⁸⁷ As an initial matter, Judge Walton rejected the argument that LOAC provides no detention authority at all

outside of international armed conflict, and that the AUMF should be construed accordingly.¹⁸⁸ LOAC, he argued, is best viewed as a restraining body of law rather than an authorizing body of law.¹⁸⁹ Thus, though it is true that Common Article 3 has no express language affirmatively authorizing detention, this merely showed that LOAC imposes no restraints on who lawfully may be detained in non-international armed conflict.

Any restraints instead must come from some other body of law, including the AUMF itself. In Judge Walton's view, however, the AUMF most certainly did confer at least some detention authority. "[W]henever the President can lawfully exercise military force, so, too, can he incapacitate the enemy force through detention rather than death."¹⁹⁰

That position, of course, was not enough to settle the legal boundaries of AUMF-based detention authority. Judge Walton next had to confront the question of who counts as the "enemy force" when you are not contending with another State's army. Borrowing from the approach of the petitioners in *Boumediene*, the detainee in *Gherebi* urged Judge Walton to adopt DPH as the measure of detainability.¹⁹¹ But he did not advocate the same conception of DPH as had the *Boumediene* petitioners. Specifically, he rejected the notion that the protections of civilian status might be waived on a sustained basis through continuous participation in hostilities, thus eliminating the need to determine whether a person was engaging in DPH at a precise point in time.¹⁹² Furthermore, the petitioner in *Gherebi* added that it would not be enough just to show that a person had engaged in DPH; in addition, he argued, the person must also have been "part of an organized armed force" rather than some independent actor.¹⁹³

In the end Judge Walton rejected the invitation to adopt one or another version of the DPH standard as a necessary condition for detainability—though he did not refrain from stating in dicta that the continuous-combat-function conception of DPH "while perhaps not quite broad enough, is a step toward the right answer," and that if he were to accept the DPH standard he would construe it to cover "all members of the armed forces of the enemy . . . at all times for the duration of hostilities."¹⁹⁴

He did agree, however, that membership in an organized armed force is a necessary condition for detention authority—indeed, he concluded that it was a sufficient condition as well.¹⁹⁵ His argument in support of this conclusion turned on the notion that the combatant category did indeed exist in non-international armed conflict.¹⁹⁶ Again noting his view that LOAC is merely restrictive in nature, and hence that silence on a point does not deprive a State of the power to act in a particular way, Judge Walton explained that the silence of Common Article 3 with respect to the existence of a "combatant category" did not mean that no such

category could be recognized in the non-international armed conflict setting.¹⁹⁷ Explicitly equating targeting and detention authority, he asserted that the members of the enemy armed force can be attacked at any time in non-international armed conflict “and, incident to that attack, detained at any time.”¹⁹⁸

In recognizing the existence of a category of detainable combatants in the non-international conflict setting, Judge Walton’s opinion in *Gherebi* was contrary to the views expressed by the Second Circuit in *Padilla* and Judge Motz in *Al-Marri*. By accepting that membership alone might establish this ground for detention, his opinion was contrary to Judge Green’s in the *In re Guantanamo Detainee Cases* (though, to be fair, Judge Green’s position against association status as a permissible detention predicate rested on the premise that the detainee had a Fifth Amendment Due Process right to invoke). And to the extent his opinion rejected the need to show a detainee had personally had involvement in hostile conduct, it seemed contrary as well to the views expressed by Judges Williams and Wilkinson in the Fourth Circuit’s en banc opinion in *Al-Marri*. It was most akin, if anything, to Judge Mukasey’s original *Padilla* opinion, and perhaps also to the concurrence of Judge Traxler in *Al-Marri*.

In any event, Judge Walton’s approach at first blush appeared to be a government-friendly one, insofar as it demanded only a showing of associational status. But whether this was in fact a flexible or narrow standard really depends on how one defines “membership” and “armed force”—concepts with relatively clear meaning in a conventional armed conflict between the armies of States, perhaps, but most certainly not in the context of conflict with a clandestine non-State network with indeterminate organizational conceptions.

As to this question, Judge Walton turned explicitly to LOAC, stating that the “criteria” set forth in GPW, Article 4 and Additional Protocol I, Article 43 constitute “templates from which the court can glean certain characteristics” of an “armed force.”¹⁹⁹ This was a challenging approach, to say the least, because if there is anything that Articles 4 and 43 emphasize as criteria for recognition as an armed force, it is adherence to LOAC—and whatever else one might say about al Qaeda and the Taliban, they neither comport their conduct with LOAC nor make any pretense of doing so. Taken literally, then, Judge Walton’s reference to the criteria in these provisions would produce precious little in the way of combatant detention authority in this particular context. But Judge Walton’s opinion did not highlight the LOAC-adherence language in these articles. Instead, he highlighted their implicit emphasis on the existence of a hierarchical command structure.²⁰⁰ Treating formal organizational structure as the hallmark of an armed force whose members might constitute detainable (and targetable) combatants, Judge Walton then

concluded that the ultimate inquiry is whether the person in question had “some sort of ‘structured’ role in the ‘hierarchy’ of the enemy force.”²⁰¹

Judge Walton did seem sensitive to the difficulties inherent in mapping that model onto the context of decentralized networks such as al Qaeda, emphasizing that one must not be too rigid in looking for formal proof that a person occupied such a position.²⁰² He noted that there usually will not be membership cards or uniforms.²⁰³ The “structured role” test, he explained, may turn instead on a particular functional inquiry: did the person “receive[] and execute[] orders” from the “command structure”?²⁰⁴

But there was a further qualification. Judge Walton explained that it is not enough that a person was part of the chain of command of the organization-as-a-whole. Rather, the person must be part of the specific chain of command associated with “the enemy force’s combat apparatus.”²⁰⁵ To be sure, Judge Walton was trying to make the point that even a logistics officer for al Qaeda could be detained if part of al Qaeda’s military chain of command.²⁰⁶ And he did also explicitly recognize that a person who at one point in time was performing a non-military function may well be subject to orders to shift to a military function after all, and hence should not be treated as a non-combatant.²⁰⁷ Nonetheless, this approach did necessarily embrace the notion of distinct “military” and “civilian” wings in such groups, with the personnel of the latter at least sometimes lying beyond the reach of the AUMF for *any* purpose, including not just detention authority but also the authority to target with lethal force.

In this way, Judge Walton’s opinion in *Gherebi* at least partially supported the government’s assertion that the AUMF conferred authority to detain the members of groups such as al Qaeda and the Taliban. As for the government’s claim that the AUMF also conferred authority to detain independent supporters of such groups, however, Judge Walton was less accommodating. He did not directly reject that claim. But he did insist that any support-based detention must comply with the “structured role” test described above, which effectively folded the support inquiry into the membership standard after all.²⁰⁸ Put simply, no purely independent supporter could be detained under that test (or, presumably, targeted with lethal force). A contrary reading, Judge Walton asserted, would cause the AUMF to conflict with LOAC, and he was unwilling to impute such a reading to the statute absent a clearer showing of legislative intent to accomplish such an end.²⁰⁹ In this way, Judge Walton broke with the more accommodating approach of Judge Leon.

Obviously Judge Walton’s approach embraces the relevance of LOAC and the premise that the United States in at least some current settings is involved in non-international armed conflict—and he offers a highly specific interpretation of what LOAC has to say about who may be detained (or targeted) as a result. Indeed,

driving home the point that his reasoning applied as much to targeting as to detention, he routinely cross-references targeting authority as turning on the exact same standards.

Just a few weeks after Judge Walton's opinion in *Gherebi*, Judge Bates issued his ruling in *Hamliily*.²¹⁰ For the most part, his analysis followed Judge Walton's. He agreed, for example, that LOAC permitted detention based on membership status even in the non-international conflict setting, notwithstanding the lack of affirmative treaty language to that effect.²¹¹ And he agreed, too, that in this context "membership" boils down to whether the individual "receives and executes orders or directions" as part of an AUMF-covered group's command structure.²¹² Unlike Judge Walton, however, he did not distinguish between the military and non-military wings of an organization, and thus did not restrict eligibility to persons subject to a military-specific chain of command.²¹³ *Hamliily*, in other words, appears more akin to the Mukasey opinion in *Padilla* and, perhaps, the Judge Traxler opinion in *Al-Marri*.

Whether Judges Walton and Bates differ with respect to non-members who provide substantial support to AUMF-covered groups is less clear. On one hand, Judge Bates concluded that LOAC simply does not permit military detention of such a person (though like all the other judges to address this question, he did not address the potential relevance of the security internment option that would be available in such circumstances in the event of international armed conflict).²¹⁴ On the other hand, he noted that membership in organizations such as al Qaeda may be more of a functional than a formal concept, and that conduct that one might describe as independent support could well be conceived instead as evidence of functional membership in some instances.²¹⁵ That said, even a functional member must still be shown to be part of the group's chain of command in order to be detained under the *Hamliily* model; truly independent supporters may not be detained no matter how important their aid might be to the group.²¹⁶

Gherebi and *Hamliily* thus are best as consistent on the point that non-members may not be detained, and consistent as well on the point that membership ultimately turns on participation in a chain of command. They appear to differ, however, with respect to whether detention authority is limited to the "military" chain of command within an organization—though the magnitude of that difference very much depends on how strictly one defines "military" in this context.

Adding to the confusion, other district judges subsequently disagreed with one another regarding whether there is a genuine difference between *Gherebi* and *Hamliily*. Judge Hogan, for example, has argued that there is not a substantial difference.²¹⁷ Judge Kessler, on the other hand, states that there is, and that she prefers the *Gherebi* approach.²¹⁸ Meanwhile, Judge Urbina in *Hatim v. Obama* articulated

an understanding of the chain-of-command test that very likely differs from what either Judge Walton or Judge Bates had in mind.²¹⁹

In *Hatim*, Judge Urbina stated that he adopts the *Hamliily* standard, including the notion that detention authority turns on whether the person in question occupied a role within a relevant group's chain of command.²²⁰ According to *Hatim*, however, merely notional status within a chain of command was not enough; one must have actually obeyed specific orders in the past in order to be a member in this sense, and hence to be detainable.²²¹ Thus, according to Judge Urbina, it was not enough for the government to prove that a person knowingly attended an al Qaeda training camp and that the individual believed that in doing so he or she had effectively joined al Qaeda.²²² It may be that Judges Bates and Walton, or other judges following the *Gherebi* and *Hamliily* standards, might interpret the chain-of-command test in the same fashion. It seems equally if not more likely, however, that they would not.

In any event, the nuanced disagreement among Judges Walton, Bates and Urbina, if disagreement there truly was, became moot once the chain-of-command question came before the D.C. Circuit Court of Appeals. In a series of cases in 2010, the Circuit has expressly rejected the proposition that one must be part of any chain of command—let alone that of the military wing of an organization—in order to qualify as a member subject to military detention under the AUMF.

The Circuit first made this point in *Al-Bihani v. Obama*,²²³ in January 2010. In that case, a divided panel offered a number of important observations regarding the lawful scope of detention authority. To begin with, the majority opinion by Judges Kavanaugh and Brown broke sharply with most of the prior detention cases by concluding that LOAC simply has no bearing on the question of who lawfully may be detained without criminal charge in this setting.²²⁴ That is to say, *Al-Bihani* broke new ground in the habeas litigation by holding that *only* domestic law sources should be considered in the course of determining the legal bounds of detention authority.

Absent reference to LOAC, however, how was the broad language of the AUMF to be construed? As noted, the AUMF itself provides some guidance at the group level, but almost no guidance at all at the individual level. Other domestic law sources would be needed, therefore, in order to address what conduct or status sufficed to link a person to an AUMF-covered group for detention purposes. And according to the majority in *Al-Bihani*, the personal jurisdiction provisions found in the MCA 2006 and MCA 2009 provided the necessary guidance.²²⁵

Those provisions clearly stated that military commissions may entertain proceedings against non-citizens who are members of AUMF-covered groups and *also* those who are non-members but who nonetheless provide support to such groups.

Asserting that a person subject to military commission prosecution under the two MCAs *a fortiori* would be subject to detention under the AUMF, the panel majority in *Al-Bihani* concluded that independent support thus constitutes a sufficient condition for detention separate and apart from proof of membership in an AUMF-covered group.²²⁶

As for the meaning of membership, the panel majority rejected the view advanced by Judge Walton in *Gherebi*, Judge Bates in *Hamli* and Judge Urbina in *Hatim* to the effect that proof of membership requires some kind of participation in a group's chain of command.²²⁷ But if the chain-of-command test did not define membership, what criteria would? Here the opinion was less clear, except as to two remarkable points. First, *Al-Bihani* asserted that a person should be deemed a member and hence subject to detention in the event that he attended a training camp sponsored by an AUMF-covered group.²²⁸ Second, it raised the possibility that merely having stayed at a guesthouse associated with an AUMF-covered group's recruitment process might also constitute adequate evidence of membership and detainability.²²⁹ These statements were dicta and hence not binding on the district court, yet they certainly signaled a broad conception of membership—arguably broader than anything previously endorsed in the habeas litigation, either before *Boumediene* or since.

Subsequent decisions by the Circuit largely reinforced *Al-Bihani*. To be sure, some of *Al-Bihani*'s punch was diluted by the fact that a majority of the active judges of the Circuit declared the panel's views about the irrelevance of international law to be mere dicta, in the course of "denying" en banc review.²³⁰ The dicta-fication of that aspect of the panel opinion did not necessarily undermine the support and membership aspects of the earlier decision, however, as the panel had also observed that it found "Al-Bihani's reading of international law to be unpersuasive."²³¹ More significantly, subsequent Circuit decisions have reinforced key aspects of the *Al-Bihani* panel opinion.

First, the unanimous opinion in *Awad v. Obama*²³²—by Chief Judge Sentelle and Judges Tatel and Garland—restated the point that one need not be part of a chain of command in order to be detainable.²³³ This would be useful evidence of membership, of course, but membership also could be shown by proof that a person self-identified as part of an AUMF-covered group or was captured in circumstances amounting to fighting on behalf of such a group.²³⁴ And in *Barhoumi v. Obama*,²³⁵ Judges Tatel, Ginsburg and Kavanaugh joined to state once again that the chain-of-command test is not a necessary condition for detention, though it happened to be satisfied in that case and did count as a sufficient condition.²³⁶

Neither *Awad* nor *Barhoumi* provided the D.C. Circuit with an opportunity to revisit or refine *Al-Bihani*'s favorable treatment of independent support as a distinct

ground for detention. Many thought that the next decision—*Bensayah v. Obama*—would do so. Bensayah himself was the last of the original *Boumediene* petitioners, the only one whom Judge Leon found was subject to detention after remand from the Supreme Court. And as noted above, Judge Leon had expressly approved reliance on independent support as a ground for detention in that case. Indeed, he had found Bensayah subject to detention not for being an al Qaeda member, but instead for having provided support to al Qaeda (in the form of facilitating the travel of would-be fighters to Afghanistan). A casual observer might have assumed, therefore, that the appeal would oblige the D.C. Circuit to give further consideration to the sufficiency of independent support as a detention ground.

A more rigorous observer, on the other hand, would anticipate that the Circuit's decision would focus on the membership ground instead. Several months earlier, Charlie Savage of the *New York Times* had reported the existence of a “pronounced” disagreement among “top lawyers in the State Department and the Pentagon,” as well as the Justice Department and other agencies, with respect to “how broadly to define the types of terrorism suspects who may be detained without trial as wartime prisoners.”²³⁷ According to Savage's account, the debate arose initially when the government was obliged to develop its revised detention position in *Hamli*.²³⁸ As noted above, the government ultimately chose to make some changes to its position, but did not abandon the claim that it had authority to detain both members and non-member supporters of AUMF-covered groups. This did not end the internal debate, however, but instead merely delayed it until such time that the administration might be faced with the choice of whether to defend a specific case on independent support grounds.²³⁹

The need to develop a position on appeal in the *Bensayah* litigation, Savage wrote, provided just such an occasion:

The arguments over the case forced onto the table discussion of lingering discontent at the State Department over one aspect of the Obama position on detention. There was broad agreement that the law of armed conflict allowed the United States to detain as wartime prisoners anyone who was actually a part of Al Qaeda, as well as nonmembers who took positions alongside the enemy force and helped it. But some criticized the notion that the United States could also consider mere supporters, arrested far away, to be just as detainable without trial as enemy fighters.²⁴⁰

Assuming the accuracy of this account, then, the specific dispute involved the conjunction of the independent support ground with the use of detention authority for captures away from the conventional battlefield. Savage reported that the State Department's newly arrived Legal Adviser, Harold Koh, championed the view “that there was no support in the laws of war” for the claim of detention authority in that

circumstance, while the Defense Department's General Counsel, Jeh Johnson, disagreed.²⁴¹ Savage indicates that the question was then put to the Justice Department's Office of Legal Counsel, which eventually produced an equivocal memorandum "stating that while the Office of Legal Counsel had found no precedents justifying the detention of mere supporters of Al Qaeda who were picked up far away from enemy forces, it was not prepared to state any definitive conclusion."²⁴²

Nonetheless, a position was needed for the *Bensayah* appeal.²⁴³ According to Savage's account, the solution was to "try to avoid that hard question" by "chang[ing] the subject" in *Bensayah*. Rather than defend the decision below on the ground relied upon by Judge Leon—i.e., that Bensayah could be detained because he provided support to al Qaeda—the government would instead seek affirmance on the ground that Bensayah was a functional member of al Qaeda.²⁴⁴ And thus the Justice Department's Civil Division came to make a most unusual filing on the eve of oral argument in the case, explaining to the court in a brief letter that the "Government's position is that this case is best analyzed in terms of whether Bensayah was functionally 'part of' al Qaida, and that the district court's judgment can and should be affirmed solely on that ground."²⁴⁵ In an indication that the internal debate had not yet been resolved, however, the letter added that

the Government is not foreclosing its right to argue in appropriate cases that the AUMF, as informed by the laws of war, permits detaining some persons based on the substantial support they provide to enemy forces, even though such persons are not themselves "part of" those forces. The Government continues to defend the lawfulness of detaining certain individuals who provide substantial support to, but are not part of, al Qaida or the Taliban.²⁴⁶

At the time he wrote, Savage did not know how this strategy would play out with the D.C. Circuit. Nonetheless, he concluded his account with a perceptive observation regarding the larger significance of the issue: "The outcome of the yearlong debate could reverberate through national security policies, ranging from the number of people the United States ultimately detains to decisions about who may be lawfully selected for killing using drones."²⁴⁷

Some nine months later, in late June 2010, the Circuit reversed in *Bensayah v. Obama*.²⁴⁸ But it is far from clear that the government's decision not to advance the independent support argument caused that outcome, nor that geographic constraints entered into the analysis. In addition to limiting its legal theory on appeal, the government also had decided not to continue to rely on certain inculpatory statements that had been made by another detainee. The latter move appeared to be the decisive one. The panel held that the remaining evidence did not suffice to prove that Bensayah had engaged in the recruiting and logistical

support activities that the government had alleged, and hence that the government had failed to show that Bensayah was a functional member of al Qaeda. By the same token, presumably, this same body of evidence would not have sufficed even if the government had advanced its original independent support theory. In any event, the litigation continues; the Circuit remanded the case not with orders to grant Bensayah's petition, but rather for Judge Leon to reconsider the merits, including any new evidence of functional membership that the government might put forward.

Thus we are left with an unusual state of affairs. After the majority of the district judges to consider the question rejected the proposition that the government lawfully may assert authority to detain independent supporters of AUMF-covered groups, the Circuit took the contrary view. In the meantime, however, the executive branch itself appears to have become internally divided on the question, and for the moment appears disinclined to take advantage of the Circuit's position on the matter—at least where the independent support occurs in a place geographically remote from a conventional battlefield.

The Circuit has not had an opportunity to weigh in on the independent support question since *Al-Bihani* and *Bensayah*. The next two circuit opinions instead touched lightly on other aspects of the substantive-scope issue. Shortly after *Bensayah*, for example, the Circuit in *Al Odah v. Obama* affirmed the detention of an individual on membership grounds.²⁴⁹ The most notable aspect of the case, for present purposes, was the fact that the opinion by Chief Judge Sentelle and Judges Rogers and Garland restated *Al-Bihani*'s suggestion that training camp attendance alone might well be sufficient to make out the case for detention on membership grounds. Then, two weeks later, Judges Randolph, Henderson and Kavanaugh in *Al Adahi v. Obama* found that evidence of a detainee's attendance at a training camp and guesthouse constituted powerful evidence of functional membership, and sharply criticized a district judge for suggesting otherwise.²⁵⁰

In contrast, the Circuit has had a chance since *Bensayah* to comment—albeit only implicitly—on the question of geographic constraints at least in the context of *membership*-based detention. In *Salahi v. Obama*, in November 2010, a circuit panel dealt with a Mauritanian detainee whom the government alleged to be an al Qaeda member but who was not captured in Afghanistan nor alleged to have been involved in combat in or near Afghanistan (at least not after the early 1990s).²⁵¹ The appellate panel expressed no concerns about the theoretical assertion of detention authority in such circumstances, but instead remanded so that the district court could reweigh the evidence under a different standard. Implicit rejection of geographic constraints in the membership setting, of course, does not compel the same with respect to detention based solely on independent support.

c. That Which Is Now Clear and That Which Remains Contested. As a result of the foregoing string of D.C. Circuit decisions, an important aspect of the government's detention authority appears settled, at least at a high level of generality and at least for the moment. Specifically, the Circuit has developed a broad consensus to the effect that membership in an AUMF-covered group is a sufficient condition for detention. But other questions remain. What precisely counts as membership in a clandestine, diffused network such as al Qaeda? Does independent support provide an alternative ground for detention? Does the location of a person's capture or underlying activities matter under either the membership or support criteria?

With respect to the detailed meaning of membership, some things have been made clear while others remain uncertain—perhaps inevitably so. The cases do establish that proof of participation in a formal chain of command would be sufficient but is not necessary to demonstrate membership. They are relatively clear, moreover, that training camp participation is highly significant to prove membership, if not a sufficient condition to do so on its own, and the cases further suggest, albeit with less force, that the same may be true for guesthouse attendance in at least some contexts. Absent those elements, however, it remains unclear which forms of involvement with the affairs of an AUMF-covered group distinguish those who can be detained from those who cannot. In that circumstance, the question would seem to depend upon the gestalt impression conveyed by the totality of the circumstances, measured against unspecified—and potentially inconsistent—metrics of affiliation held by particular judges. Consider, in that regard, the way in which Judge Bates summarized the task in a recent, post-*Al-Bihani* opinion:

“[T]here are no settled criteria” for determining who is “part of” the Taliban, al-Qaida, or an associated force. “That determination must be made on a case-by-case basis by using a functional rather than formal approach and by focusing on the actions of the individual in relation to the organization.” The Court must consider the totality of the evidence to assess the individual's relationship with the organization. But being “part of” the Taliban, al-Qaida, or an associated force requires “some level of knowledge or intent.”²⁵²

Even when the training camp or guesthouse elements are present, moreover, it is not clear that they will always suffice. Indeed, one of the first district court opinions to emerge against the backdrop of the Circuit's interventions directly challenged the relevance of guesthouse attendance, arguing that the connotations of guesthouse attendance vary depending on the house in question and that residence at the guesthouse in that particular case was not necessarily inculpatory.²⁵³ On the other hand, another recent district court opinion gives substantial weight to the fact that a detainee attended a Taliban-controlled guesthouse, particularly

when viewed in combination with evidence that a Taliban recruiter gave the man money, a passport and a ticket for air travel, and that the man twice went near to the front lines and received a weapon from a person who likely was a Taliban member.²⁵⁴

Note that similar disagreements could yet emerge in connection with the training camp variable. Like guesthouses, training camps can vary in terms of their provenance and connotations. Some clearly were or are operated by al Qaeda or the Taliban, but not all were; fact patterns may arise that raise difficult questions of attribution and inference.²⁵⁵ Of course, it may be that no further refinement of the variables defining membership is possible in this setting, and that the status quo represents the realistic maximum when it comes to defining this criterion (though it should at least be possible to clarify the geographic question).

In any event, the status quo certainly has not settled the separate question of whether detention may be predicated on a showing of independent support to an AUMF-covered group—nor whether, if such a criterion is legitimate, it must be limited to persons who were captured or acted in certain geographic locations, or for that matter whether it must be confined to only certain types of support or to support rendered with certain specific mental states.

Finally, the question of geography continues to loom large in the substantive-scope debate. Recent litigation associated with alleged plans to conduct a targeted killing of an American citizen in Yemen, on the ground that the individual was an operational leader of al Qaeda in the Arabian Peninsula, has sharpened the debate as to whether LOAC's field of application is strictly limited to geographically defined battlefields of a conventional nature or if, instead, any LOAC-related authority to use force attaches to at least some enemy-affiliated personnel wherever they may travel (or, more narrowly, to such persons when they are located in denied or ungoverned areas).²⁵⁶ The question is at least as pertinent in the detention context. As noted above, at least two of the Guantanamo habeas cases thus far—*Bensayah* and *Salahi*—involved detainees with remote or no linkages to any traditional battlefield, and the judges in those instances expressed no particular concerns on that point—though they did not expressly address the issue. The earlier experience of the *Al-Marri* litigation, meanwhile, suggests there may yet be judicial disagreement on the point.

Overarching all these questions, finally, is the lingering disagreement regarding which bodies of law actually govern. The *Al-Bihani* panel opinion sought to resolve this dispute by forbidding reference to LOAC and other forms of international law. Though the Circuit majority subsequently neutered that claim by declaring it to be dicta, it did not go so far as to issue a contrary holding to the effect that any such body of law does actually apply. In any event, as Part I illustrated, determining that

a particular body of law applies does not ensure agreement as to what that body of law requires when it comes to selecting and calibrating the variables that combine to form the individualized detention standard.

III. The Significance of the Emerging Law Governing Detention Criteria

In the wake of this descriptive account, several questions arise. First, does it actually matter that the habeas process has not yet resolved the disagreements and unanswered questions noted in Part II? Second, if this does matter, is it preferable to simply be patient, leaving the matter in judicial hands, or instead should Congress intervene with legislation?

A. Do the Disagreement and Uncertainty Matter?

The persistence of disagreement and unresolved questions regarding the substantive-scope issue in the habeas litigation is problematic on many levels. First, the uncertainty and disagreement may prove significant with respect to the many as-yet-undecided Guantanamo habeas cases. True, the vast majority of the Guantanamo habeas cases to this point have turned on other issues—above all, questions of evidentiary sufficiency. Only *Basardh*, in which Judge Huvelle made an ill-fated attempt to limit detention authority to circumstances in which a person was likely to cause harm if released, clearly turned on an issue involving the scope of detention authority that the judge in question was prepared to recognize. But much more habeas litigation is to come, and hence this question may yet prove dispositive for some Guantanamo detainees. No one can say for sure precisely how many cases may yet proceed to the merits, but it seems likely that we are not yet halfway through. We cannot know at this point whether the substantive-scope question will remain marginal to the merits. If it does become central in these future cases, the continuing uncertainty surrounding the question is problematic from both the detainee and the government perspectives.

Second, the pool of habeas cases eventually may encompass more than the Guantanamo detainees. Whether this will come to pass most likely depends, however, on whether the United States resumes the practice of taking long-term custody of individuals captured outside of States in which conventional armed conflict is occurring. This issue has been tested to some extent in the context of Afghanistan. Attorneys representing a group of US military detainees in Afghanistan have been attempting for several years now to establish habeas jurisdiction over detention operations there. They met with mixed success at the district court level, with Judge Bates holding that non-Afghans may pursue habeas relief if captured outside of Afghanistan and brought there for detention by the United States,

whereas none of those actually captured in Afghanistan could do so.²⁵⁷ A D.C. Circuit panel subsequently reversed on the first point only, explaining that “all of the attributes of a facility exposed to the vagaries of war are present in Bagram” and that the US detention facility in Afghanistan (then at Bagram, today in Parwan) is in “territory under neither the de facto nor de jure sovereignty of the United States and within the territory of another de jure sovereign.”²⁵⁸ The court did not, however, close the door to habeas jurisdiction entirely. The panel went out of its way to observe that there was no evidence in this case that the detainees had been brought into Afghanistan in order to evade judicial review, as their transfer occurred long before *Boumediene* rendered Guantanamo subject to judicial review.²⁵⁹ The panel warned that if “such manipulation by the Executive” were proven in a future case, the outcome might be different.²⁶⁰ In the course of remanding that case to Judge Bates for further proceedings, moreover, the Circuit noted that it might take a different view even in that very case should new evidence emerge regarding the nature of US detention operations in Afghanistan.

Given that the United States is actively engaged in a process meant to culminate in the transfer of control over its long-term detention operations in Afghanistan to the Afghan government (just as we already have transferred control of our detention operations in Iraq to the government there), and absent evidence that the United States is still in the business of capturing persons elsewhere and bringing them to Afghanistan for purposes of long-term detention, it must be said that the prospects for an extension of habeas to Afghanistan are increasingly slim notwithstanding these caveats. The more significant lesson from the Afghan habeas litigation, therefore, is that courts going forward likely would be receptive to an extension of habeas to any location should the United States in the future resume the practice of taking and maintaining military custody of individuals captured outside of a traditional battlefield context. It may be that the United States will avoid that practice in the future, substituting some combination of rendition, host-nation detention,²⁶¹ targeted killing, surveillance, prosecution or inaction in its place. But if the practice of long-term detention for non-battlefield capture re-emerges, so too will the questions surrounding habeas jurisdiction.

Even if habeas jurisdiction remains limited to Guantanamo, however, there are still other reasons to believe the uncertainty associated with the substantive-scope jurisprudence to be problematic. Most significantly, the struggle over who may be held matters not only for those detainees who already have or may one day receive the right to seek habeas review but also for any detention operations that ultimately depend upon the same underlying legal authority—i.e., the AUMF. That is to say, if judges determine in the habeas setting that the AUMF extends only to certain groups or fact patterns, commanders and policymakers must take that judgment

into account whenever acting under that same authority—whether subject to habeas review or not. In practical terms, this means that the habeas jurisprudence can and presumably will impact all AUMF-based detention operations—including specifically all detention operations in Afghanistan—even though very few detentions beyond Guantanamo are or likely ever will be subject to direct habeas review. Civilian government lawyers advising policymakers, and military judge advocates advising commanders in the field, have an obligation to take account of this caselaw in the course of devising policy and procedure regarding who may be detained prospectively and what standard should be employed when carrying out screening of detainees post-capture. In this way, the detention-scope jurisprudence arising out of Guantanamo could come to impact a far greater number of detainees. Unfortunately, policymakers and commanders at the moment lack clarity regarding the boundaries of their authority, yet have little choice but to proceed in the shadow of this uncertainty.

Making matters worse, spillover effects from the Guantanamo habeas might not be limited to detention operations. The effects may extend to AUMF-based *targeting* decisions as well. That is to say, the detention-scope debate may overhang the decision to kill under color of the AUMF as much it overhangs the decision to detain under that authority.

The point is not an immediately obvious one; the power to kill and the power to detain are by no means coextensive. But they need not be coextensive in order for the Guantanamo habeas litigation to impact the legal bounds of targeting authority elsewhere. Again, the AUMF is the transmission mechanism. Say that in the course of the habeas litigation, courts ultimately determine that the AUMF must be construed to apply only to sworn members of al Qaeda and the Taliban who have received military-style training. Assume further that a commander subsequently desires to launch a missile from a drone into the window of a car being driven in Yemen by a local man whom he believes to act as a fund-raiser for al Qaeda—but whom he also knows has not sworn an oath to al Qaeda or attended any training camps. The strike on its face would not be an exercise of force supported by the AUMF, whatever its consistency with LOAC or IHRL.

It may be that the strike could yet be justified, but the important point for present purposes is that the issue at the very least would be clouded by the narrowing construction of the AUMF produced via the habeas litigation. Thus military operations not directly subject to judicial review²⁶² nonetheless may be impacted indirectly by the development of detention-scope jurisprudence. And as in the detention context, the dynamic matters not so much because it exists, but rather because it is transmitting *uncertainty*.

Finally, the habeas litigation may also generate spillover effects by virtue of the fact that the judges in the course of resolving the detention-scope issue have engaged with concepts that are both contested and likely to arise in future, unrelated contexts involving military force. This is most obviously the case with respect to the episodes in which judges have grappled with the meaning of “direct participation in hostilities” in an effort to clarify the scope of the government’s detention authority. The merits of referencing DPH for this purpose are considered above. For now, the important point is that when courts do make use of DPH in this way, they may be obliged to define this deeply contested concept. And once they do this, their opinion will matter at least to an extent in any subsequent context in which that LOAC concept matters—without regard to whether that subsequent context has anything to do with the AUMF. Any future armed conflict implicating the DPH question—which is to say, any future armed conflict—henceforth would take place in the shadow of that earlier opinion. Much the same might be said for frequently employed statutory language like “all necessary and appropriate force,” moreover.

B. Should Congress Intervene?

Assume for the sake of argument that the emerging habeas jurisprudence does indeed involve a substantial degree of disagreement and uncertainty with respect to individualized detention criteria, and that this disagreement and uncertainty are important in relation to future cases and to other, collateral matters. It does not follow automatically that Congress should step in with legislation designed to address the situation.

One might oppose legislative intervention on the ground that the process of refining the law in this area should be left in the hands of the judiciary. Judges, after all, routinely disagree about fine points of law concerning complex subjects, and the appellate review over time will tend to smooth out such discrepancies in the traditional common law fashion. This is, in fact, the argument advanced by a pair of advocacy groups—Human Rights First and the Constitution Project—in a document titled *Habeas Works: Federal Courts’ Proven Capacity to Handle Guantanamo Cases: A Report from Retired Federal Judges*.²⁶³ The report contends that the “lower courts are steadily progressing toward a workable detention standard,”²⁶⁴ and denies that judges have to “draft” a substantive standard or otherwise are engaged in a “lawmaking” process. What the judges are doing instead, the report argues, is merely “interpreting and applying” the detention standard established by Congress and the President in the AUMF as informed by the laws of war.²⁶⁵ To the extent that the report acknowledges any variation among the judges, it characterizes that variation benignly as the mere “gradual exploration and shaping of the

detention standard,” in traditional common law–like fashion.²⁶⁶ *Habeas Works* concludes that “there is no reason to doubt the ability of the three-level federal court system to develop a substantive detention standard.”²⁶⁷

That last claim no doubt is correct. As Judge Wilkinson’s opinion in *Al-Marri* illustrates, judges can undertake to develop detention standards meant to conform to the peculiarities of the non-State-actor context. And so too no one doubts that the common law process in theory can smooth out the many disagreements that actually arise when judges undertake to do this, much as courts in the past used case-by-case adjudication to develop and amend substantive rules for torts, contracts and the like. But this is a straw man argument. The important question is whether it would be better for Congress to play the primary role in crafting the details of the detention standard.

There are several factors to consider in thinking about this question. First, one could select between these approaches based on the normative desirability of the substantive standard one believes is most likely to be produced in the end by each. On close inspection, however, the two options may be close to a wash along this dimension.

Those who would prefer to see greater restraints on the government’s capacity to detain might at first blush be inclined to disfavor legislation on the theory that Congress most likely would adopt a broad detention standard and that the judiciary over time will settle upon a more constrained approach. Proponents of a broad standard, by the same token, might favor legislation for the same reason. The Democratic-controlled Congress in 2009 and 2010 persistently used the power of the purse to make it more difficult for the President to close Guantanamo, after all, and the Republican takeover of the House in 2010 might be expected to tilt Congress still further toward erring on the side of facilitating rather than restraining military detention. But careful consideration of the trends in the caselaw described in Part II suggests that it would be unwise to assume that the judiciary in the end will adopt narrower tests. The sequence of D.C. Circuit opinions in 2010, beginning but by no means ending with *Al-Bihani*, if anything suggests the contrary. And though many of the Circuit’s decisions are now the subject of pending certiorari petitions, it would be foolish to assume that the Supreme Court will both take up the substantive-scope question and adopt more constrained positions with respect to it; Justice Kagan is recused from these cases in light of her recent role as the Solicitor General, and Chief Justice Roberts and Justices Scalia, Thomas and Alito are unlikely to be interested in such a narrowing approach.

Fear of, or desire for, a broad detention standard accordingly does not point clearly in favor of or against legislative intervention. What other factors, then, might one bring to bear in developing a well-considered position on the question?

Second, one could focus on the democratic pedigree of the resulting rule set. That is, one might favor legislative intervention because the lawmaking process would do more to contribute to a national debate and public engagement on the question, and the resulting rules would in any event bear a superior stamp of democratic legitimacy. In response, one might note that we routinely have relied on common law processes to develop and refine rules in other important settings. But it is not clear we ever have done so in a context that impacted contemporaneous military operations to this extent. Here, the question at issue is one that speaks directly to an issue of pressing national concern: just who is it that the United States purports to be at war with? A strong argument can be made that the United States has a moral obligation to engage in a forthright national debate on this subject if we are to have military detention at all; indeed, that argument has been made, and it is rather convincing.²⁶⁸

Third, one might favor or disfavor legislation on grounds of speed and finality in light of my argument that lingering uncertainty regarding the precise boundaries of detention authority is harmful. For example, one might argue that legislation will settle the substantive-scope question more quickly than the ongoing process of common law development. That process, after all, dates back at least to the initial decision by Judge Mukasey in *Padilla* in late 2002, and does not seem likely to end anytime soon. Anticipating this concern, *Habeas Works* argues that some amount of residual ambiguity—and thus some need for case-by-case clarification—invariably will remain even in the event of a legislative intervention.²⁶⁹ This is true, but the reduction in ambiguity via a statute if carefully designed could reduce the total amount of work left to be accomplished through the habeas lens. Then again, an inartfully drafted statute could achieve the opposite by introducing entirely new ambiguities and undoing points of consensus already established through the existing habeas jurisprudence.

Fourth, one might take account of the fact that legislative rulemaking as a general proposition is more easily revisited than rules derived through the habeas process. Should experience demonstrate that a statutory definition of the bounds of detention authority is too broad or too narrow, that definition can be revised in the ordinary course of further legislation. Inclusion of a sunset provision in legislation, moreover, could guarantee periodic reassessment. Judicially crafted rules are not so readily altered, however. The judiciary is reactive rather than proactive. It must have a case or controversy in order to have the occasion to take up a question, and hence the opportunity to revise the substantive scope of detention authority may or may not be there even if the existing standard proves unwise. Even assuming a proper case arises, moreover, the time lag between the beginning of a case and final judgment by the last court to consider the matter

can be substantial—particularly if it is necessary for the Supreme Court to intervene in order to limit or reverse precedent.

These factors, taken together, incline me to think that legislation on the substantive-scope question would in fact be desirable, at least in the abstract. In particular, it would be desirable to have express statutory language that

- confirms that membership in an AUMF-covered group is a sufficient condition for detention;
- provides that participation on such a group's chain of command, knowing attendance at a military-style training camp operated by such a group and perhaps other factors constitute substantial but not dispositive evidence of membership;
- articulates a *mens rea* standard for membership, such as a requirement that the individual not only knew the identity of the group but intended to become an active participant in its affairs and thereby to facilitate, directly or indirectly, the unlawful ends of the group;²⁷⁰
- takes a clear position on whether the provision of support independent of membership can count as a sufficient condition to justify detention, and articulates a corresponding *mens rea* element such as intent to facilitate, directly or indirectly, the group's unlawful use of violence; and
- specifies whether there are any geographic limitations as to the availability of detention (e.g., limiting detention to persons captured outside the United States, or limiting support-based detention to persons captured in connection with combat operations).

All that said, any serious discussion of legislative intervention also must account for the fact that in no plausible scenario would Congress address only the substantive-scope question. Rather, if it reaches this question at all, Congress almost certainly would simultaneously address any number of other related matters, including the procedural and evidentiary rules associated with habeas review. Depending on what one expects Congress to produce on those issues, then, even someone who supports the idea of legislation on the substantive-scope question may conclude that legislation on the whole is undesirable.

* * *

We lack consensus regarding who lawfully may be held in military custody in the contexts that matter most to US national security today—i.e., counterterrorism and counterinsurgency. More to the point, federal judges lack consensus on this question. They have grappled with it periodically since 2002, and for the past three years have dealt with it continually in connection with the flood of habeas corpus litigation arising out of Guantanamo in the aftermath of the Supreme Court's 2008

decision in *Boumediene v. Bush*. Unfortunately, the resulting detention jurisprudence is shot through with disagreement on points large and small. As a result, the precise boundaries of the government's detention authority remain unclear despite the passage of more than nine years since the first post-9/11 detainees came into US custody.

We should not be surprised at this disagreement. The conflicting efforts of the judges reflect the fact that the very metrics of legality are deeply contested in this setting. We do not agree which bodies of law should govern in the first instance and, even if we did, we then encounter indeterminacy and plausible disagreement with respect to what each body of law actually has to say, if anything, about the detention-scope question. Making matters worse, these difficulties arise in a context in which familiar legal frameworks experience substantial evolutionary pressures, making it difficult to distinguish descriptive and normative arguments about the legal limits of the government's authority. Against this backdrop it becomes easy to see that the judges at times are speaking past one another, much as occurs in the larger public debate.

Understandable or not, though, this state of affairs is problematic. Most obviously, it renders the prospects for success in the Guantanamo habeas litigation uncertain for both the government and the detainees. More significantly, however, the failure to resolve the detention-scope question casts a shadow across an array of military activities that are not directly subject to habeas review. The mixed pronouncements overhang detention operations in Afghanistan that are not subject to habeas review, insofar as those detentions depend on the same underlying claims of authority that undergird the government's position in the Guantanamo litigation. And by the same token, the habeas caselaw may have the same spillover effect on *targeting* operations—i.e., the use of lethal force—in places as varied as Pakistan, Yemen and Somalia.

It is important to bring these disagreements, their causes and their consequences to the surface, and to push for their resolution. The Obama administration, after all, is not going to abandon the use of military detention. The Guantanamo habeas litigation will not conclude for years to come. The use of detention in Afghanistan will persist for some time. Even in Iraq—even after the supposed end of combat operations—a small population of US-controlled military detainees continues to exist, and will do so for some time. Uses of lethal force, via drone strikes and otherwise, will continue with respect to al Qaeda targets in various spots around the world for the foreseeable future. Were it all to end tomorrow, moreover, we could still expect future situations to arise in which another administration decides to employ military detention in a setting involving terrorism or insurgency, giving rise to the same set of issues.

Simply put, the problem is embedded in our evolving strategic context—particularly in the perception that non-State actors have become increasingly empowered, to the point that some can pose a strategically significant threat. Insofar as law and strategic context exist in dynamic relationship with one another, then, the question is not whether the law will adapt to these circumstances. It will, sooner or later, more or less appropriately. The question, instead, concerns which institutions we will rely upon to mediate that process.

Notes

1. See, e.g., CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, I LEGAL LESSONS LEARNED FROM AFGHANISTAN TO IRAQ 53 (2004) (describing uncertainty regarding the status of the initial detainees in Afghanistan in late 2001).

2. See Robert Chesney, *Iraq and the Military Detention Debate: Firsthand Perspectives from the Other War, 2003–2010*, VIRGINIA JOURNAL OF INTERNATIONAL LAW (forthcoming 2011).

3. See *infra* Part II.

4. More than 100,000 persons have been detained without charge in Iraq alone since 2003. See Chesney, *supra* note 2. The US detention facility in Parwan in Afghanistan holds approximately 1,000 individuals at a time, and the prior primary detention facility in Afghanistan—the Bagram Theater Internment Facility—held approximately 600–800 at a time. See Spencer Ackerman, *U.S. Scans Afghan Inmates for Biometric Database*, WIRED (Aug. 25, 2010), <http://www.wired.com/dangerroom/2010/08/military-prison-builds-big-afghan-biometric-database/> (giving the figure for Parwan); Editorial, *Backward at Bagram*, NEW YORK TIMES, June 1, 2010, at A26 (giving the figure for Bagram). Approximately 779 individuals have been held over time at Guantanamo. See BENJAMIN WITTES & ZAAHIRA WYNE, THE CURRENT DETAINEE POPULATION OF GUANTANAMO: AN EMPIRICAL STUDY 1 (2008). Three more individuals—including one who for a time was held at Guantanamo—also were held in military custody inside the United States. See *infra* Part II.A.

5. Compare Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARVARD LAW REVIEW 2047, 2113 (2005) (“Terrorist organizations that act as agents of al Qaeda, participate with al Qaeda in acts of war against the United States, systematically provide military resources to al Qaeda, or serve as fundamental communication links in the war against the United States, and perhaps those that systematically permit their buildings and safehouses to be used by al Qaeda in the war against the United States, are analogous to co-belligerents in a traditional war”) and Robert Chesney, *More on the AQ/AQAP Issue, Including Thoughts on How the Co-Belligerent Concept Fits In*, LAWFARE (Nov. 4, 2010), <http://www.lawfareblog.com/2010/11/more-on-the-aqaqap-issue-including-thoughts-on-how-the-co-belligerent-concept-fits-in/> (exploring the co-belligerent issue) with Kevin John Heller, *The ACLU/CCR Reply Brief in Al-Aulaqi (and My Reply to Wittes)*, OPINIO JURIS (Oct. 9, 2010), <http://opiniojuris.org/2010/10/09/the-aclu-ccr-reply-brief-in-al-aulaqui-and-my-reply-to-wittes/> (denying that the co-belligerent concept applies as a matter of international law in the context of non-international armed conflict).

6. The first habeas petition arising out of Guantanamo was filed within weeks of the first detainees' arrival there in January 2002. See *Gherebi v. Bush*, 374 F.3d 727, 729 (9th Cir. 2004). The Supreme Court finally settled the question as a constitutional matter in the summer of 2008,

after two rounds of legislative intervention. *See* *Boumediene v. Bush*, 553 U.S. 723 (2008) (holding that the Military Commissions Act of 2006 violated the Suspension Clause insofar as it forbade Guantanamo detainees from seeking habeas relief in federal court). *See also* *Rasul v. Bush*, 542 U.S. 466 (2004) (holding that the federal habeas statute as then written provided jurisdiction over the claims of Guantanamo detainees); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (holding that the government failed to provide adequate process to a US citizen held in military custody on grounds of membership in the Taliban).

7. 553 U.S. 723.

8. *See infra* Part II.A.

9. *See infra* Part II.B.

10. *See* *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010).

11. *See* *Al-Bihani v. Obama*, 619 F.3d 1 (D.C. Cir. 2010) (Sentelle, C.J.) (opinion denying en banc review).

12. For a review of a broad range of issues in the post-2008 habeas litigation, including the centrality of evidentiary questions, see BENJAMIN WITTES, ROBERT M. CHESNEY & RABEA BENHALIM, *THE EMERGING LAW OF DETENTION: THE GUANTANAMO HABEAS CASES AS LAWMAKING* (2010), available at http://www.brookings.edu/papers/2010/0122_guantanamo_wittes_chesney.aspx.

13. *Cf.* *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010) (holding that habeas jurisdiction does not extend to Afghanistan, though noting caveats that preserve the possibility of a different outcome upon different factual predicates).

14. *See id.* at 98–99. *See also* *Al Maqaleh v. Gates*, No. 09-5265 (D.C. Cir. July 23, 2010) (order noting that detainees in an attempt to obtain rehearing made reference to evidence not in the record, and stating that denial of habeas petition is “without prejudice to [detainees’] ability to present this evidence to the district court in the first instance”), available at <http://www.scotusblog.com/wp-content/uploads/2010/07/Bagram-order-7-23-10.pdf>.

15. *See infra* Part III.A.

16. *But see* Josh Gerstein, *Treasury to Allow Anwar al-Awlaki Lawsuit*, POLITICO, Aug. 3, 2010, <http://www.politico.com/news/stories/0810/40616.html> (noting ACLU plans to sue to stop the lethal use of force by the US government against an American citizen in Yemen).

17. Pub. L. No. 107-40, 115 Stat. 224 (2001), codified at 50 U.S.C. § 1541 note (Supp. V 2005) [hereinafter AUMF].

18. *Cf.* *Hamdi*, 542 U.S. at 587 (Thomas, J.) (“Although the President very well may have inherent authority to detain those arrayed against our troops, I agree with the plurality that we need not decide that question because Congress has authorized the President to do so.”). Because the current administration rests its detention-related arguments solely on the AUMF, and because it is not clear that the analysis ultimately turns on this issue in any event, for the most part in this article I refer only to the AUMF as a source of domestic detention authority.

19. *See* U.S. CONST. art. VI, cl. 2 (providing that treaties are “supreme Law of the Land”).

20. *See* Carlos Manuel Vázquez, *The Military Commissions Act, the Geneva Conventions, and the Courts: A Critical Guide*, 101 AMERICAN JOURNAL OF INTERNATIONAL LAW 73, 88 (2007) (examining various arguments relating to self-executing treaties and legislative efforts to unexecute them in relation to the Geneva Conventions).

21. *See* U.S. Department of State, U.S. Government’s 1-year Follow-up Report to the Committee’s Conclusions & Recommendations 1–2 (2007), available at <http://2001-2009.state.gov/documents/organization/100845.pdf>. On the general issue of extraterritoriality, see KAL RAUSTIALA, *DOES THE CONSTITUTION FOLLOW THE FLAG? THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW* (2009).

22. See Ingrid Wuerth, *International Law and Constitutional Interpretation: The Commander-in-Chief Clause Reconsidered*, 106 MICHIGAN LAW REVIEW 61 (2007).

23. See Bradley & Goldsmith, *supra* note 5; Ingrid Wuerth, *Authorizations for the Use of Force, International Law, and the Charming Betsy Canon*, 46 BOSTON COLLEGE LAW REVIEW 293 (2005).

24. See International Law Association, *The Use of Force: Final Report on the Meaning of Armed Conflict in International Law* (2010), available at <http://www.ila-hq.org/download.cfm/docid/2176DC63-D268-4133-8989A664754F9F87> [hereinafter ILA Use of Force Report].

25. See, e.g., Marco Sassòli, *Terrorism and War*, 4 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 959, 965 (2006) (“As for the lower threshold of a non-international armed conflict, no clear-cut criteria exist, but relevant factors include: intensity, number of active participants, number of victims, duration and protracted character of the violence, organization and discipline of the parties, capacity to respect [international humanitarian law], collective, open and coordinated character of the hostilities, direct involvement of governmental armed forces (vs. law enforcement agencies) and *de facto* authority by the non-state actor over potential victims.”).

26. Jordan Paust, *Responding Lawfully to al Qaeda*, 56 CATHOLIC UNIVERSITY LAW REVIEW 759, 760 (2007).

27. See, e.g., *Al-Aulaqi v. Obama*, No. 10-cv-1469 (D.D.C. Oct. 8, 2010) (declaration of Professor Mary Ellen O’Connell), at 7 (“Armed conflict has a territorial aspect. It has territorial limits. It exists where (but only where) fighting by organized armed groups is intense and lasts for a significant period. . . . That the United States is engaged in armed conflict against al Qaeda in Afghanistan does not mean that the United States can rely on the law of armed conflict to engage suspected associates of al Qaeda in other countries.”), available at http://www.aclu.org/files/assets/O_Connell_Declaration.100810.PDF.

28. See ILA Use of Force Report, *supra* note 24.

29. 999 U.N.T.S. 171, 6 INTERNATIONAL LEGAL MATERIALS 368 (1967) [hereinafter ICCPR].

30. See *infra* Part I.B.3.

31. ICCPR, *supra* note 29, art. 2.

32. See U.S. Department of State, *supra* note 21.

33. See, e.g., Patrick Walsh, *Fighting for Human Rights: The Application of Human Rights Treaties to United States Military Operations*, 28 PENN STATE INTERNATIONAL LAW REVIEW 45, 60 (2009).

34. See *infra* Part II.A.

35. For a sampling of this scholarship, see Marko Milanovic, *A Norm Conflict Perspective on the Relationship Between International Humanitarian Law and Human Rights*, 14 JOURNAL OF CONFLICT AND SECURITY LAW 459 (2009); Jeremy Marsh, *Rule 99 of the Customary International Humanitarian Law Study and the Relationship between the Law of Armed Conflict and International Human Rights Law*, ARMY LAWYER, May 2009, at 18 (2009).

36. For a more thorough exposition, see Laura Olson, *Practical Challenges of Implementing the Complementarity Between International Humanitarian Law and Human Rights Law*, 40 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 437, 445–49 (2009).

37. See, e.g., Martti Koskeniemi, International Law Commission, Study Group on Fragmentation, *Fragmentation of International Law: Topic (a): The function and scope of the *lex specialis* rule and the question of ‘self-contained regimes’: An outline* (2003), available at http://untreaty.un.org/ilc/sessions/55/fragmentation_outline.pdf (last visited Dec. 8, 2010).

38. See, e.g., Jeff A. Bovarnick, *Detainee Review Boards in Afghanistan: From Strategic Liability to Legitimacy*, ARMY LAWYER, June 2010, at 9 (2010).

39. See, e.g., Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 240 (July 8).

40. See, e.g., Olson, *supra* note 36.

41. AUMF, *supra* note 17.

42. *Id.* § 2(a).

43. 18 U.S.C. § 4001(a) (2000).

44. 71 U.S. (4 Wall.) 2 (1866). *But see* Ex parte Quirin, 317 U.S. 1 (1942) (permitting military commission jurisdiction over an American citizen who was part of the German armed forces in World War II, and distinguishing *Milligan* on the ground that *Milligan* had not actually been part of the enemy force).

45. AUMF, *supra* note 17.

46. See *infra* Part II.B.

47. We should not overstate the level of consensus with respect to the objects of the AUMF even at this group/organizational level, however, as there is ample room for disagreement regarding the degree of institutional affiliation with al Qaeda or the Taliban that is necessary in order for other, arguably distinct entities to be deemed subject to the AUMF as well. There are numerous entities in the Afghanistan-Pakistan theater, for example, that are engaged to varying degrees in hostilities against the United States or the Afghan government yet do not constitute subsidiaries of either al Qaeda or the Taliban. The Haqqani Network provides an example, as might the Tehrik-i-Taliban Pakistan (not to be confused with the original Afghan Taliban commanded by Mullah Omar, now best referred to as the Quetta Shura Taliban). Arguments can be made that AUMF-based authority extends to such groups as cobelligerents of al Qaeda and the Taliban, but the AUMF itself does not speak to the issue. Similarly, consider the al Qaeda “affiliate” scenario represented by the Algerian extremist group once known as *Groupe Salafiste pour la Prédication et le Combat* (GSPC) or the Salafist Group for Preaching and Combat. Its activities primarily are directed toward the Algerian government, but Osama bin Laden may have provided funding or otherwise assisted when GSPC originally broke off from the *Groupe Islamique Armé* in the 1990s. Its leadership declared allegiance to bin Laden in 2003, and in 2006 it changed its name to al Qaeda in the Islamic Maghreb (AQIM) after Ayman al-Zawahiri formally announced its affiliation. For an overview, see Andrew Hansen & Lauren Vriens, *Al-Qaeda in the Islamic Maghreb* (AQIM), CFR.ORG (July 21, 2009), http://www.cfr.org/publication/12717/alqaeda_in_the_islamic_maghreb_aqim_or_lorganisation_alqada_au_maghreb_islamique_formerly_salafist_group_for_preaching_and_combat_or_groupe_salafiste_pour_la_prdication_et_le_combat.html. When precisely, in light of all this, did AQIM become sufficiently linked to al Qaeda to be considered within the scope of the AUMF, if ever? The AUMF itself does not provide guidance.

48. See Bradley & Goldsmith, *supra* note 5.

49. See Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STANFORD LAW REVIEW 1079, 1096–99 (2008).

50. Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2680, 2739 (2005).

51. *Id.*

52. *Id.*

53. Pub. L. No. 109-366, 120 Stat. 2600 (2006).

54. See *id.* § 3 (adding 10 U.S.C. § 948c).

55. See *id.* (adding 10 U.S.C. § 948a(1) and (2)).

56. See Title XVIII of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. No. 111-84, 123 Stat. 2190, enacted October 28, 2009).

57. Pub. L. No. 111-84, § 1802, 123 Stat. 2574, 2576 (2009) (adding 10 U.S.C. §§ 948a(7) (defining “unprivileged enemy belligerent”) & 948c (defining jurisdiction to encompass alien “unprivileged enemy belligerents”)).
58. *Id.* (adding 10 U.S.C. § 948a(7)).
59. *Id.*
60. See also Richard H. Fallon Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARVARD LAW REVIEW 2029, 2109 (2007).
61. See, e.g., CONGRESSIONAL RESEARCH SERVICE, *AL QAEDA AND AFFILIATES: HISTORICAL PERSPECTIVE, GLOBAL PRESENCE, AND IMPLICATIONS FOR U.S. POLICY* (2010), available at <http://fpc.state.gov/documents/organization/137015.pdf>.
62. Cf. Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE LAW JOURNAL 1170 (2007) (supporting deference); Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE LAW JOURNAL 1230 (2007) (criticizing Posner & Sunstein).
63. See Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GPW].
64. See *id.* arts. 21 (authorizing internment of POWs) & 118 (requiring release and repatriation of POWs upon conclusion of hostilities).
65. These categories are contained in GPW Article 4(a)(1–3). Article 4 goes on to list various other scenarios in which a person is to be accorded POW status.
66. See Convention Relative to the Protection of Civilian Persons in Time of War arts. 27, 42, 43 & 78, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC].
67. COMMENTARY TO GENEVA CONVENTION IV RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 257–58 (Jean S. Pictet ed., Ronald Griffin & C.W. Dumbleton trans., 1958).
68. Cf. *Ex parte Quirin*, 317 U.S. 1 (1942) (categorizing saboteurs associated with the German military as unprivileged belligerents, albeit in the years prior to the 1949 Geneva Conventions). Note that many other States—but not the United States—are party to the 1977 Protocols Additional to the Geneva Conventions of 12 August 1949. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609.
69. See, e.g., Gabor Rona, *A Bull in a China Shop: The War on Terror and International Law in the United States*, 39 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL 135 (2008).
70. See *id.*
71. See, e.g., Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 AMERICAN JOURNAL OF INTERNATIONAL LAW 48 (2009).
72. See *id.*
73. This arguably is the best account of the plurality opinion in *Hamdi*, which referred to customary practice during war in a context—Afghanistan in 2004—that evolved from an international to a non-international armed conflict. See 542 U.S. 507.
74. See Chesney, *supra* note 2.
75. See Gabor Rona, *Legal Frameworks to Combat Terrorism: An Abundant Inventory of Existing Tools*, 5 CHICAGO JOURNAL OF INTERNATIONAL LAW 499 (2005).
76. ICCPR, *supra* note 29.
77. *Id.*, art. 9(1).
78. See *id.*, art. 4(1). Article 4(3) specifies that the derogating State is to “immediately inform the other State Parties” of the derogation, as well as the reasons for it.

79. See, e.g., Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict–Criminal Divide*, 33 YALE JOURNAL OF INTERNATIONAL LAW 369, 383–89 (2008) (discussing administrative detention as an IHRL-compatible alternative to criminal prosecution in circumstances in which LOAC-based detention is not appropriate).

80. See *id.* at 392–95 (observing that “pure security-based detention is permitted under the ICCPR, so long as it is reasonably necessary to contain the security threat. The problem, again, is that the Human Rights Committee has provided almost no guidance on when security-based detention should be considered reasonably necessary”). Hakimi does note that the European Court of Human Rights has interpreted the comparable provision in the European Convention on Human Rights as forbidding non-criminal detention intended solely for security purposes. See *id.* at 392 (citing, *inter alia*, *Lawless v. Ireland* (No. 3), 3 Eur. Ct. H.R. (ser. A), ¶¶ 13–15, 48 (1961)).

81. 542 U.S. 507 (2004). The same plurality also concluded that Hamdi, as a citizen with Fifth Amendment procedural due process rights, should receive more process in the course of determining whether he was a Taliban fighter. See *id.* at 533–34. The government soon thereafter released Hamdi, sending him back to Saudi Arabia after he agreed in writing to relinquish his claim to US citizenship.

82. See *id.* at 519–20.

83. See *id.* at 518.

84. *Id.* at 515–16 (citing *Ex parte Quirin*, 317 U.S. 1, 37–38 (1942); *In re Territo*, 156 F.2d 142, 148 (9th Cir. 1946)); *id.* at 592 (Thomas, J.) (concurring in part and dissenting in part) (citing *Quirin*).

85. *Id.* at 522 n.1.

86. *Id.* at 521.

87. See *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002).

88. *Id.* at 587–91.

89. *Id.* at 592–93.

90. *Id.* at 593–98.

91. See *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003).

92. *Id.* at 714–18.

93. *Id.* at 718.

94. *Id.* at 719–24.

95. *Rumsfeld v. Padilla*, 542 U.S. 426 (2004). The dissent by Justice Stevens did offer the view that Padilla’s detention could not be sustained on the merits if the government’s justification for it rested entirely on the desire to interrogate him. See *id.* at 465 (“Executive detention of subversive citizens, like detention of enemy soldiers to keep them off the battlefield, may sometimes be justified to prevent persons from launching or becoming missiles of destruction. It may not, however, be justified by the naked interest in using unlawful procedures to extract information.”).

96. *Padilla v. Hanft*, 389 F. Supp. 2d 678, 687 (D.S.C. 2005).

97. *Id.* at 686.

98. *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005).

99. *Id.* at 392.

100. *Id.* at 389–90.

101. *Id.* at 391–92.

102. *Id.* at 392, 393.

103. Al-Marri initially sought habeas review in Illinois but, like Padilla, eventually was obliged to refile in South Carolina. See *al-Marri v. Rumsfeld*, 274 F. Supp. 2d 1003 (C.D. Ill. 2003) (holding that petition had to be filed in district in which al-Marri was held at the time of filing), *aff’d*, 360 F.3d 707 (7th Cir. 2004).

104. See *Al-Marri v. Hanft*, 378 F. Supp. 2d 673, 676–77 (D.S.C. 2005).
105. *Id.* at 679–80.
106. See *Al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007).
107. *Id.* at 174–75.
108. *Id.* at 175.
109. *Id.* at 175–76.
110. *Id.* at 178–79.
111. *Id.* at 179 n.8 (asserting that civilians under LOAC categorically are “not subject to military seizure or detention”).
112. *Id.* at 178–79 (citing GPW, *supra* note 63, arts. 2, 4, 5 and GC, *supra* note 66, art. 4).
113. *Id.* at 179–82.
114. *Id.* at 184–85.
115. *Id.* at 182.
116. See *Al-Marri v. Pucciarelli*, 534 F.3d 213, 219 (4th Cir. 2008) (en banc).
117. See *id.* at 221–52.
118. See *id.* at 259–60.
119. See *id.* at 260–61.
120. See *id.* 261–62.
121. *Id.* at 286 (noting the *Charming Betsy* canon favoring constructions of statute to comport with international law, but concluding that the AUMF is sufficiently clear so as to trump any contrary customary law rule).
122. *Id.* at 285. *But see id.* at 288 (emphasizing allegation that al-Marri was a member of al Qaeda since 1996, as opposed to emphasizing his conduct in entering the United States to conduct or support an attack).
123. *Id.* at 287 n.5.
124. *Id.* at 293.
125. *Id.*
126. *Id.* at 293–303.
127. *Id.* at 312.
128. *Id.* at 313.
129. *Id.* at 314.
130. *Id.*
131. *Id.* at 315.
132. *Id.* at 315–19.
133. *Id.* at 319.
134. See *id.* at 318–19.
135. *Id.* at 317.
136. *Id.* at 316 (quoting Bradley & Goldsmith, *supra* note 5, at 2114).
137. *Id.* at 316–17.
138. *Id.* at 319–21.
139. *Id.* at 314–19. He made this point clear at the very outset of his opinion, in fact, observing that the “advance and democratization of technology proceeds apace” and that, as a result, “we live in an age where thousands of human beings can be slaughtered by a single action and where large swaths of urban landscapes can be leveled in an instant.” *Id.* at 293. The law must “show some recognition of these changing circumstances,” must “reflect the actual nature of modern warfare.” *Id.*
140. *Id.* at 314. See also *id.* at 319. Note that Judge Wilkinson elsewhere in the opinion quotes expressly from Philip Bobbitt’s *Shield of Achilles*, a central text supporting the proposition of a

dynamic relationship between law and strategic context—not to mention the notion that non-State actors engaging in mass-casualty terrorism strongly implicate that relationship. *See id.* at 300. Judge Wilkinson plainly was aware of, and in agreement with, this line of argument.

141. *Id.* at 319.

142. *Id.*

143. *Id.* at 293.

144. *Id.* at 322–25.

145. *Id.* at 325.

146. *See id.* at 323.

147. *Id.*

148. *Id.* at 324.

149. *See* *Al-Marri v. Spagone*, 129 S.Ct. 1545 (2009).

150. In 2006, the Supreme Court in *Hamdan v. Rumsfeld* held that the DTA did not apply to habeas petitions that were pending at the time the DTA was enacted, at least insofar as its military commission–related provisions were concerned. 548 U.S. 557. Congress responded by enacting the Military Commissions Act of 2006, which in effect made the jurisdictional provisions of the DTA applicable to pending cases. This set the stage for the Supreme Court in *Boumediene* to hold that the MCA violated the Constitution’s Suspension Clause, and that the detainees were entitled to habeas review as a constitutional matter.

151. *See* *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005) (holding that detainees had no judicially enforceable substantive rights notwithstanding *Rasul*).

152. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 464 (D.D.C. 2005).

153. *See id.* at 474–77.

154. *Id.* at 475 (citing, *inter alia*, *Scales v. United States*, 367 U.S. 203, 224–25 (1961) (holding that criminal punishment of membership in a subversive organization would violate the Fifth Amendment unless the statute were construed to require proof that the defendant’s membership was more than merely nominal and that the defendant specifically intended to further the organization’s unlawful ends)).

155. *Id.* at 476. Redactions in the opinion make it difficult to determine more about her reasoning, but the context strongly suggests that she was particularly concerned that the government might be detaining individuals strictly for their intelligence value. *See id.* at 477.

156. Perhaps it was not surprising that Judge Green would make a point of attempting to restrain the government’s capacity to detain based on associated ties. During oral argument in the case, she had posed a series of hypothetical questions to the government attorney with the apparent aim of clarifying the government’s conception of the outer boundaries of the ostensible authority to detain on the basis that a person provided support to an AUMF-covered group. Specifically, she asked whether this detention criterion would be met by a “little old lady in Switzerland” who was duped into providing funds to a charity group that turned out to be an al Qaeda front. One might have expected the attorney to answer no, as this fact pattern at a minimum does not involve inculpatory *mens rea*. But it did not turn out that way. The government attorney insisted, incredibly, that all were detainable. The moment would go on to dubious immortality in Judge Green’s published opinion, not to mention becoming a standard citation in the secondary literature; it would be hard to overestimate its iconic value as a symbol for those who feared that the post-9/11 assertion of detention authority had become detached from any real legal constraints.

157. *See* Brief for Petitioner, *Boumediene v. Bush*, No. 06-1196, 2007 WL 2441590 (Aug. 24, 2007).

158. *See id.* at 36–37.

159. See *id.* at 39.

160. See *id.* at 39–41.

161. See *id.*

162. See *id.*

163. See NILS MELZER, INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009). More to the point, see the collection of materials generated in the fractious process of attempting to generate consensus in the process that resulted in the ICRC's publication, posted here: <http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-article-020709> (last visited Dec. 8, 2010).

164. See Brief for Petitioner, *supra* note 157, at 39–40.

165. See *id.* at 41.

166. See *id.* (stating that DPH would “certainly cover Osama Bin Laden—and conceivably others who have submitted themselves to the direction and control of an organization like al Qaeda”).

167. See *id.* at 40–41.

168. 553 U.S. 723.

169. See WITTES, CHESNEY & BENHALIM, *supra* note 12, at 86–105 (summarizing decisions as to twenty-four individuals whose petitions were resolved as of January 2010). For the ten decisions denying relief between January and December 2010, see *Obaydullah v. Obama* (D.D.C. Oct. 19, 2010); *al-Bihani v. Obama* (D.D.C. Sept. 22, 2010) (involving detainee Toffiq Nasser Awad al-Bihani) (*available at* https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2005cv2386-1773); *al Kandari v. United States* (D.D.C. Sept. 15, 2010) (involving detainee Fayiz Mohammed Ahmed al Kandari); *Khan v. Obama* (D.D.C. Sept. 3, 2010) (involving detainee Shawali Khan); *Sulayman v. Obama* (D.D.C. July 20, 2010) (involving detainee Abd Al Rahman Abdu Abu Al Ghayth); *Khalifh v. Obama* (D.D.C. May 28, 2010) (involving detainee Omar Mohammed Khalifh); *Abdah v. Obama* (D.D.C. Apr. 18, 2010) (involving detainee Yasein Khasem Mohammed Esmail); *Al Warafi v. Obama* (D.D.C. Mar. 24, 2010) (involving detainee Mukhtar Yahia Naji al Warafi); *Al Adahi v. Obama*, 692 F. Supp. 2d 85 (D.D.C. Mar. 10, 2010) (involving detainee Suleiman Awadh Bin Agil Al-Nadhi); *Al Adahi v. Obama* (D.D.C. Mar. 10, 2010) (involving detainee Fahmi Salem Al-Assani). For the six individuals who prevailed on their habeas petitions between January and August 22, 2010, see *Abdah v. Obama* (D.D.C. July 21, 2010) (involving detainee Adnan Farhan Abd al Latif); *Almerfedi v. Obama* (D.D.C. July 23, 2010) (involving detainee Hussain Salem Mohammad Almerfedi); *Abdah v. Obama* (D.D.C. May 26, 2010) (involving detainee Mohamed Mohamed Hassan Odaini); *Al Harbi v. Obama*, May 13, 2010 (D.D.C. May 10, 2010) (involving detainee Ravil Mingazov); *Abdah v. Obama* (D.D.C. Apr. 21, 2010) (involving detainee Uthman Abdul Rahim Muhammed Uthman); *Salahi v. Obama* (D.D.C. Apr. 9, 2010) (involving detainee Mohammedou Ould Salahi).

170. The four affirmances are *Al Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010), *Awad v. Obama* (D.C. Cir. June 2, 2010), *Barhoumi v. Obama* (D.C. Cir. June 11, 2010) and *al Odah v. United States* (D.C. Cir. 2010). The reversal occurred in *Bensayah v. Obama*, 610 F.3d 718 (D.C. Cir. 2010).

171. See *al-Adahi v. Obama*, 613 F.3d 1102 (D.C. Cir. July 13, 2010).

172. See *Salahi v. Obama* (D.C. Cir. Nov. 5, 2010).

173. For an overview, see Lyle Denniston, *Primer: The New Detainee Cases*, SCOTUSblog (Dec. 7, 2010), <http://www.scotusblog.com/2010/12/primer-the-new-detainee-cases/>.

174. *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008).

175. Not long after the Uighur decision, the D.C. Circuit determined that DTA review should be discontinued in favor of the habeas proceedings mandated by *Boumediene*. See *Bismullah v. Gates*, 551 F.3d 1068 (D.C. Cir. 2009).

176. For a general overview of the issues broached in the cases, see WITTES, CHESNEY & BENHALIM, *supra* note 12, *passim*.

177. 612 F. Supp. 2d 30, 35 (D.D.C. 2009).

178. *Id.* at 34.

179. See *id.* at 35. Judge Huvelle's opinion does not actually explain the nature of what had been widely disclosed to the public. A *Washington Post* article from February 2009 describes Basardh as having cooperated extensively with US authorities, indicating that this had become known to other detainees and that Basardh was thought to be in danger from them. See Del Quintin Wilber, *Detainee-Informer Presents Quandary for Government*, WASHINGTON POST, Feb. 3, 2009, at A1, available at http://www.washingtonpost.com/wp-dyn/content/article/2009/02/02/AR200902023337_pf.html.

180. See *Awad v. Obama*, 646 F. Supp. 2d 20, 24 (D.D.C. 2009) (Robertson, J.); *Anam v. Obama*, No. 04-1194, slip op. at 4 (D.D.C. Jan. 6, 2010) (Hogan, J.).

181. See *Awad v. Obama*, 608 F.3d 1 (D.C. Cir. 2010) (holding that “[w]hether a detainee would pose a threat to U.S. interests if released is not at issue in habeas corpus proceedings”).

182. See *Boumediene v. Bush*, 583 F. Supp. 2d 133 (D.D.C. 2008). Recall that Judge Leon years earlier in *Khalid v. Bush* had declined to reach this question on the ground that the detainees lacked any substantive rights supporting such an inquiry.

183. *Id.* at 134.

184. *Id.*

185. See *id.*

186. See Exec. Order No. 13493, § 1, 74 Fed. Reg. 4901 (Jan. 27, 2009) (Review of Detention Policy Options).

187. See 609 F. Supp. 2d 43 (D.D.C. 2009).

188. See *id.* at 55–56.

189. See *id.* at 65.

190. *Id.* at 62.

191. See *id.* at 63.

192. See *id.* at 63–64.

193. *Id.* at 63.

194. *Id.* at 64 n.15.

195. See *id.* at 66–67.

196. See *id.*

197. *Id.*

198. *Id.*

199. *Id.* at 68.

200. See *id.*

201. *Id.*

202. See *id.* at 68–70.

203. See *id.* at 68.

204. *Id.*

205. *Id.*

206. See *id.*

207. See *id.* This view is consistent with *In re Territo*, a World War II case in which an Italian-American POW unsuccessfully argued that because his job in the Italian Army amounted to non-combat manual labor, he should not be held in detention. See 156 F.2d 142 (9th Cir. 1946).

208. 609 F. Supp. 2d at 69–70.

209. *Id.* at 69–70 & n.17.

210. *Hamlily v. Obama*, 616 F. Supp. 2d 63 (D.D.C. 2009).

211. See *id.* at 73.

212. *Id.* at 75.

213. See *id.*

214. See *id.* at 75–76.

215. See *id.* at 76–77.

216. See *id.* at 75–77.

217. See *Anam v. Obama*, 653 F. Supp. 2d 62 (D.D.C. 2009) (stating that *Hamlily* is “not inconsistent” with *Gherebi*, and that any apparent difference “is largely one of form rather than substance”).

218. See *Al Odah v. Obama*, 648 F. Supp. 2d 1, 6–7 (D.D.C. 2009).

219. See 677 F. Supp. 2d 1 (D.D.C. 2009).

220. See *id.* at 5–6.

221. See *id.* at 6–7.

222. See *id. passim*.

223. 590 F.3d 866 (D.C. Cir. 2010).

224. See *id.* at 871–72.

225. See *id.* at 872–73.

226. See *id.*

227. See *id.*

228. See *id.* at 873 n.2.

229. See *id.*

230. See *Al-Bihani v. Obama*, 619 F.3d 1, 1 (D.C. Cir. 2010).

231. See 590 F.3d at 871.

232. 608 F.3d 1 (D.C. Cir. 2010).

233. See *id.* at 10–12.

234. See *id.*

235. 609 F.3d 416 (D.C. Cir. 2010).

236. See *id.* at 424–26.

237. Charlie Savage, *Obama Team Is Divided on Anti-Terror Tactics*, NEW YORK TIMES, Mar. 28, 2010, at A1, available at <http://www.nytimes.com/2010/03/29/us/politics/29force.html?pagewanted=all>.

238. See *id.*

239. See *id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. See *id.*

244. See *id.*

245. *Boumediene v. Obama*, No. 08-5537 (D.C. Cir. Sept. 22, 2009) (letter from Sharon Swingle of the Justice Department’s Civil Division to the Clerk of the United States Court of Appeals for the District of Columbia Circuit), at 1.

246. *Id.* at 1–2.

247. Savage, *supra* note 237.
248. 610 F.3d 718 (D.C. Cir. 2010).
249. 611 F.3d 8 (D.C. Cir. 2010).
250. 2010 WL 2756551 (D.C. Cir. July 13, 2010).
251. 625 F.3d 745.
252. Khan v. Obama (D.D.C. Sept. 3, 2010) (citations omitted).
253. See Almerfed v. Obama, No. 05-1645, 2010 WL 2899060 (D.D.C. July 8, 2010).
254. See Sulayman v. Obama (D.D.C. July 20, 2010).
255. Cf. United States v. Maldonado, Superseding Criminal Complaint (prosecuting defendant for receiving military-style training from al Qaeda, though the training was provided by al Shabab in Somalia), available at http://www.foxnews.com/projects/pdf/Maldonado_Complaint.pdf.
256. For an introduction to this debate, see Robert Chesney, *Has Human Rights Watch Changed Its Position on Targeted Killing and the Field of Application of IHL?*, LAWFARE (Dec. 9, 2010), <http://www.lawfareblog.com/2010/12/has-human-rights-watch-changed-its-position-on-targeted-killing-and-the-scope-of-application-of-ihl/>. The targeted killing suit recently was dismissed by Judge Bates on standing and political question grounds in *Al-Aulaqi v. Obama* (D.D.C. Dec. 8, 2010).
257. See Al Maqaleh v. Gates, 604 F. Supp. 2d 205 (D.D.C. 2009), *rev'd* 605 F.3d 84 (D.C. Cir. 2010).
258. 605 F.3d at 97–98.
259. *Id.* at 98–99.
260. *Id.* at 99.
261. We may yet also see litigation involving the scope of detention authority involving US citizens allegedly held by other States under US direction or control—so-called “proxy detention.” See Press Release, ACLU of Southern California, ACLU/SC Suit Seeks Information on U.S. ‘Proxy Detention’ of American Citizen in the U.A.E. (Aug. 18, 2010), available at <https://www.aclu-sc.org/releases/view/103037>.
262. The American Civil Liberties Union and the Center for Constitutional Rights recently made waves by filing a suit challenging the government’s claim of authority to use lethal force against Anwar al-Aulaqi, an American citizen alleged to be a member of al Qaeda in the Arabian Peninsula. See *supra* note 5. That suit is remarkable precisely because such litigation is exceedingly rare. No earlier suit seeks to preclude the use of lethal military force against a particular individual. Prior attempts to restrain the government from exercising military force at a more general level, such as efforts to stop the use of military force in Vietnam, Cambodia and Laos, largely foundered in the face of justiciability objections. And at least for the time being, so too has the al-Aulaqi litigation. See *Al-Aulaqi v. Obama* (D.D.C. Dec. 8, 2010) (dismissing complaint on standing and political question grounds).
263. HUMAN RIGHTS FIRST, HABEAS WORKS: FEDERAL COURTS’ PROVEN CAPACITY TO HANDLE GUANTANAMO CASES: A REPORT FROM RETIRED FEDERAL JUDGES 13–16 (2010) [hereinafter REPORT FROM RETIRED FEDERAL JUDGES], available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/Habeas-Works-final-web.pdf>. In the interest of full disclosure, I note that *Habeas Works* criticizes a report I coauthored with Benjamin Wittes and Rabea Benhalim in which we contend that the judges in the habeas cases have been left by Congress and the President to craft most of the substantive and procedural law governing the habeas proceedings. See *id.* at 27 (criticizing WITTES, CHESNEY & BENHALIM, *supra* note 12).
264. *Id.* at 13–16.
265. *Id.*

266. *Id.* at 16.

267. *Id.*

268. See BENJAMIN WITTES, DETENTION AND DENIAL (forthcoming 2011).

269. REPORT FROM RETIRED FEDERAL JUDGES, *supra* note 263, at 28.

270. *Cf.* *Scales v. United States*, 367 U.S. 203, 209 (1961) (permitting a criminal prosecution on membership grounds where a person is an active member of a group who intends to facilitate the group's unlawful ends).

PART V

**THE CHANGING CHARACTER OF THE
PARTICIPANTS IN WAR: CIVILIANIZATION OF
WARFIGHTING AND THE CONCEPT OF
“DIRECT PARTICIPATION IN HOSTILITIES”**

VII

The Changing Character of the Participants in War: Civilianization of Warfighting and the Concept of “Direct Participation in Hostilities”

Charles Garraway*

The fact that the nature of conflict has changed is not in dispute. The question that is being asked is how this has affected the traditional law of armed conflict, particularly as it has developed in the modern era. Modern codification of the law began almost simultaneously on opposite sides of the Atlantic. In the United States, during the Civil War, Dr. Lieber drafted the Lieber Code,¹ designed for the Unionist forces. Meanwhile, in Europe, Henry Dunant, following his experience at the Battle of Solferino, was working to fulfill his dream of providing succor to the victims of armed conflict. The first emanation of this was the Geneva Convention of 1864.²

What was of particular interest in both these initiatives is the emphasis on those who took a direct part in hostilities. In both Europe and the United States, conflict was restricted to defined geographical areas. The limits on the range of weaponry meant that this could be so. Thus there was, for the most part, a clear distinction

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between the “battlefield” and other areas, and between those who took a direct part in hostilities and those who did not. Battles were largely set pieces between armed forces and did not involve the civilian population. At the first battle of Bull Run in July 1861, civilian sightseers came down from Washington in order to take vantage points on the surrounding hills. They thought they were entirely safe but even then, they learned a sharp lesson as, to their total surprise, the Union forces were routed and the civilians found themselves caught up in the ignominious retreat.

As weaponry increased in power, the battlefield turned into the battlespace. The growing range of artillery and of airpower meant that no longer could war be limited to armed forces. Civilians were becoming involved, at first as victims of the new weaponry as occurred in the area bombings of the Second World War, and then as participants. As war became all-encompassing and the difference between front lines and rear areas began to evaporate, total war involved the mobilization of the whole population. Some were in the armed forces; others went into other occupations supporting the war effort, e.g., working in ammunition factories or transport units.

One of the key principles of the law of armed conflict has always been that of distinction; a clear separation is to be kept between those who take a direct part in hostilities and those who don't. Those who don't are protected from direct attack and those engaging in conflict are required to take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and destruction or damage to civilian objects. On the other hand, the growing involvement of civilians in activities relating to conflict in itself caused difficulties. Where is the dividing line to be drawn? The dilemma was met in 1977 by a provision that civilians enjoy protection from attack “unless and for such time as they take a direct part in hostilities.”³

Until comparatively recent times, the distinction between direct and indirect participation in hostilities was comparatively uncontroversial. It was agreed that working in industries supporting the war effort, such as ammunition factories, did not amount to “direct participation,” though, as the factory itself would remain a military objective, this might not be too much of a protection. On the other hand, those who committed “acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces”⁴ were seen as taking a direct part in hostilities and thus losing their protection. However, as the nature of warfare has changed, so have the participants. Now, in the battlespace, there are many different actors. The regular armed forces sometimes seem to be almost in a minority. The complexity of weaponry has led to a growing number of civilian contractors hired to maintain, repair and in some cases even

operate equipment. Unmanned aerial combat vehicles can be operated by personnel situated thousands of miles away from the conflict area. The cost of maintaining military personnel has also led to the contracting out of many support functions, particularly logistics. The merging of front lines and rear areas has meant that rear area security, often in the past carried out by civilian personnel, has now developed into a major industry so that private military and security companies bid for contracts all over the world in areas where they will be operating in areas of conflict.

Even the nature of fighting forces has changed. While in international armed conflict regular armed forces continue to predominate, there are an increasing number of armed groups and even individuals who involve themselves in the hostilities. In non-international armed conflict, one party is by definition “irregular.” How does the principle of distinction apply to all these new actors in the battlespace?

Linked to this is the growing overlap between the law of armed conflict and human rights law. Some continue to argue that these two separate parts of public international law are indeed separate and there is no overlap. However, for most, particularly States that are members of the Council of Europe and thus subject to the European Convention of Human Rights,⁵ that is no longer even an arguable position. How then do the protective provisions of human rights law, which do not contain the same distinctions between civilians and direct participation, being technically applicable to all, apply in situations of armed conflict?

To complicate matters still further, the lines between conflict and law enforcement have themselves become blurred. Terrorism, which in the past was looked upon as a domestic problem to be dealt with under the law enforcement paradigm, has become ideological “warfare” extending across international boundaries. Terrorists have acquired weaponry and equipment, the power of which would be the envy of many States.

All these factors have led to increasing strain on the laws of war as we know them. Are the restraints of the Geneva Conventions “quaint” and “obsolete” in this “new paradigm”?⁶ Or are we merely seeing a development of previous types of warfare which do not affect the underlying principles?

The International Committee of the Red Cross (ICRC) realized at an early stage after 9/11 that the principle of distinction might be under threat and that it was necessary to seek to establish guidelines to assist governments to differentiate between those who are protected from direct attack and those who are not. At the center of this issue is the phrase “taking a direct part in hostilities.” Who qualifies as a “civilian”? What is the meaning of “direct part”? What are the consequences of losing protection?

In conjunction with the TMC Asser Institute, the ICRC established an expert process in 2003 to see if answers could be found to these questions. The experts

held five meetings between 2003 and 2008 but, although there was much agreement, that agreement did not extend to many of the key issues. As usual, it is the hard cases where the differences came to the fore.⁷

At the end of the process, the ICRC decided to issue its own *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*.⁸ The ICRC made it plain that the *Interpretive Guidance* “is widely informed by the discussions held during these expert meetings but does not necessarily reflect a unanimous view or majority opinion of the experts.”⁹ Unanimity would have been difficult as, on some of the key issues, the division was wide and the views strongly held on all sides. Indeed, a number of the experts, particularly those who held government positions (though all experts took part in their private capacity), felt it necessary to withdraw from the process as the nature of the *Interpretive Guidance* became clear. As a result, the *Interpretive Guidance* has been highly controversial and subject to strong criticism.¹⁰ At the same time, Dr. Nils Melzer, the ICRC’s author of the *Interpretive Guidance*, and others have defended the text.¹¹

But what is the debate about? The first issue is on the definition of “civilian,” particularly in non-international armed conflict. The *Interpretive Guidance* holds that organized armed groups of a party to the conflict do not qualify as civilians. However, in non-international armed conflicts, because of the difficulty in defining members of such groups and the risk that “membership” might then lead to persons who were members of political or social wings of such groups losing protection, “members” are limited only to “individuals whose continuous function it is to take a direct part in hostilities (‘*continuous combat function*’).”¹² To some, this was going too far in that it created a new group of individuals who were not “combatants,” since there is no combatant status in non-international armed conflict, but who were no longer classed as “civilians.” To others, it did not go far enough, in that “continuous combat function” did not properly equate to the regular armed forces opposed to the group. Those in support functions such as the logistician, cook or even lawyer, who might be considered as “combatant” members if in the regular armed forces, would normally not qualify as legitimate targets under the “continuous combat function” test.

In relation to the constitutive elements of direct participation in hostilities, the *Interpretive Guidance* suggested three cumulative conditions. The relevant section states:¹³

In order to qualify as direct participation in hostilities, a specific act must meet the following cumulative criteria:

1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and
2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and
3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).

These three constituent elements, threshold of harm, direct causation and belligerent nexus, may be thought to be helpful and seem to have received general approval. While there may be differences on the edges such as whether voluntary human shields come within “direct causation,”¹⁴ the concepts themselves seem to be well grounded both in existing law and in practice.

Perhaps the most controversial part of the *Interpretive Guidance* has proved to be the third part, namely, the consequences of the loss of protection. It states in Recommendation IX that

[i]n addition to the restraints imposed by international humanitarian law on specific means and methods of warfare, and without prejudice to further restrictions that may arise under other applicable branches of international law, the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.¹⁵

This has been interpreted by some as introducing a rule of graduated use of force whereby lethal force may only be used, even against combatants, only if it is “actually necessary.” The *Guidance* includes a quote from Jean Pictet that

[i]f we can put a soldier out of action by capturing him, we should not wound him; if we can obtain the same result by wounding him, we must not kill him. If there are two means to achieve the same military advantage, we must choose the one which causes the lesser evil.¹⁶

A number of experts in the process, mainly from government backgrounds, saw this as the introduction of a human rights standard into international humanitarian law and vigorously opposed it. They argued that no such rule existed in law in that the traditional interpretation was that a combatant who had the right to

conduct hostilities in accordance with the law of armed conflict also could be targeted at any time and in any place. It was accepted that on many occasions, where it was possible to do so, capture might be a preferable option but it was not a rule of law. There were also concerns over the use of the word “actually.” Did this introduce an *ex post facto* element into the decision-making process? If the “armed” person facing the soldier turned out to have no bullets in his weapon, was it “actually necessary” to kill him?

The debate has been bitter and the issues have sometimes become confused. The *New York University Journal of International Law and Politics* published a Forum consisting of four articles by critics from Canada, the United States and the United Kingdom of the *Interpretive Guidance*, all of whom had been involved in the expert process.¹⁷ The same volume published a lengthy riposte to the critics by Dr. Melzer.¹⁸ What seems clear is that the *Interpretive Guidance* has launched an extensive debate, one which will be continued in this volume of the “Blue Book” series.

However, while direct participation may seem to be the key to the “civilianization” of warfare, there are a number of other issues which should not be forgotten. One is the growing use of private companies to fulfill what were previously considered to be military tasks. Increasingly, as mentioned earlier, Western forces are outsourcing specific functions to such companies. Logistics are now heavily reliant on civilian contractors, whether it is the cook who provides the food in the mess tent or the weapons technician who provides an in-theater repair capability for a complex weapons system. Transportation is now heavily civilianized and this became a factor in the direct participation debate. However, more problematic is the growing number of companies providing security in complex emergencies. These can range from static guards for civilian businesses to bodyguards for senior government officials.

How far can or should such companies become involved in military activities? What are the limits on their participation and to what extent does the contextual situation change the status of the personnel? Is training of military personnel in a peacetime environment acceptable but not in a country racked by conflict? Where are the dividing lines?

The regulation of private military and security companies has been a matter of concern to governments and indeed to responsible companies within the industry. An initiative by the Swiss government in cooperation with the ICRC led to the signing on September 17, 2009 of the Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies during Armed Conflict.¹⁹ This document, initially signed by seventeen States, led to efforts to develop an international code of conduct that would set forth norms and standards for the provision of private

security services with some form of accountability mechanism. These efforts, which included an active collaboration of members of the private security industry with the Swiss Department of Foreign Affairs, the Geneva Centre for the Democratic Control of Armed Forces and the Geneva Academy of International Humanitarian Law and Human Rights, resulted in the International Code of Conduct for Private Security Service Providers in November 2010²⁰ signed by fifty-eight companies.

Underlying all of these discussions is the even more fundamental issue of the relationship between the law of armed conflict and human rights law. As the boundaries between law enforcement and armed conflict become increasingly blurred, it becomes harder for the soldier to know which is the predominant paradigm.

Traditionally, the law of armed conflict and human rights law have been seen as separate and distinct. One was the law of war and the other the law of peace. Never the twain should meet. However, that separation no longer can be upheld. Quite apart from the problems of delineation across the spectrum of violence, the two systems of law have also deliberately sought to expand their own spheres of influence.

At the end of the Second World War, in keeping with the traditional divide, the law of armed conflict belonged almost exclusively to international armed conflict—war between States. In 1949, the first tentative steps were made to extend some provisions to non-international armed conflicts through the medium of Common Article 3.²¹ At the same time, the United Nations in its attempts “to save succeeding generations from the scourge of war” sought to “reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.”²² In December 1948, the General Assembly of the United Nations adopted the Universal Declaration of Human Rights.²³ Although “universal,” no direct mention is made in the Declaration of time of war. It is only in later documents such as the European Convention for the Protection of Human Rights of November 1950 (entering into force in September 1953)²⁴ and the International Covenant on Civil and Political Rights of 1966²⁵ that there is reference to wars and states of emergency.

Common Article 3 is important because it extended only small parts of the law of armed conflict into non-international armed conflict. These parts dealt with the protection of individuals (“Geneva law”) and not the conduct of hostilities (“Hague law”). However, that has now changed. In the Diplomatic Conference that led to the adoption of the two 1977 Additional Protocols to the 1949 Geneva Conventions, detailed proposals were put forward to extend the “Hague-type” provisions introduced in Additional Protocol I,²⁶ and thus applicable only to international armed conflict, into Additional Protocol II,²⁷ dealing with non-international armed conflict. For the most part, these attempts were unsuccessful and Additional Protocol II contains primarily “Geneva-type” law. However, the tide was already

turning and today there is an increasing trend for law of armed conflict treaties to apply across the board to all types of conflict. The ICRC's study *Customary International Humanitarian Law*,²⁸ published in 2005, supported this trend, coming to the conclusion that almost all "Hague-type" law was now applicable to all conflicts, both international and non-international.

At the same time, the International Court of Justice²⁹ and a number of human rights bodies,³⁰ in particular the European Court of Human Rights,³¹ were confirming that human rights law applied at all times, including in times of conflict and public emergency, subject only to derogation and to the relationship between human rights law and the law of armed conflict as the *lex specialis*. Unfortunately, while the principle seemed to be established, the devil, as always, is in the detail and the nature of the relationship between human rights law and the law of armed conflict has not been adequately defined.

The extension of "Hague-type" law into non-international armed conflict itself causes difficulties. Whereas "Geneva law" is primarily concerned with the interests of victims and thus tends to give primacy to the interests of humanity over military necessity, "Hague law" is more of a balance. It is accepted in the law of armed conflict that in conflict there will be damage to civilian property and civilian lives will be lost. However, the principle of proportionality seeks to keep this damage and loss of life within reasonable bounds, taking into account the nature of conflict.

Human rights law sits reasonably comfortably alongside "Geneva law" but less comfortably with "Hague law." The concept of balance is more limited in human rights law, particularly in those areas that are of most importance in conflict. Thus the rules for the use of force in the law of armed conflict are difficult to reconcile with the right to life under human rights law.

While conflict was a distinct activity conducted, for the most part, away from civilian locations, these divergences were reasonably unimportant. However, in "wars amongst the people," they become critical and need to be resolved.³² Indeed, the reconciliation of human rights law and the law of armed conflict in a manner that provides a comparatively seamless and coherent set of rules across the spectrum of violence may be the challenge of the next generation of international lawyers.

The civilianization of warfighting poses many challenges to the accepted legal framework. Some of the work being done and the concepts being explored are examined in these following contributions by the members of the panel I chaired. Much, however, remains to be done. Unless the problems and challenges are recognized and faced, they will never be met and resolved. The characteristics of conflict may be changing but that does not mean that the need for regulation is changing too. The laws of war have stood the test of time down the centuries,

adapting as required to meet new situations. The essential balance between humanity and military necessity has underpinned the regulation of conflict through those centuries, adjusting to meet each new challenge, each “new paradigm.” Our task is to ensure that that balance is maintained in the world as we face it in the first quarter of the twenty-first century.

Notes

1. U.S. Department of War, Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, Apr. 24, 1863, *reprinted in* THE LAWS OF ARMED CONFLICTS 3 (Dietrich Schindler & Jiri Toman eds., 4th ed. 2004).

2. Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 22, 1864, 22 Stat. 940, T.S. No. 377, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 1, at 365.

3. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 51(3), June 8, 1977, 1125 U.N.T.S. 3, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 1, at 711, 736 [hereinafter Additional Protocol I].

4. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶ 944 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987).

5. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 15, Nov. 4, 1950, 213 U.N.T.S. 222, *reprinted in* BASIC DOCUMENTS ON HUMAN RIGHTS 610, 615 (Ian Brownlie & Guy S. Goodwin-Gill eds., 5th ed. 2006).

6. See Memorandum to the President from Alberto R Gonzales, Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban (Jan. 25, 2002), *reprinted in* THE TORTURE PAPERS – THE ROAD TO ABU GHRAIB 118 (Karen Greenberg & Joshua Dratel eds., 2005), *available at* <http://www.slate.com/features/whatistorture/LegalMemos.html>.

7. The full record of the expert proceedings can be found on the ICRC website, <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/direct-participation-article-020709?opendocument>.

8. INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009), *available at* http://www.icrc.org/eng/assets/files/other/icrc_002_0990.pdf [hereinafter Interpretive Guidance].

9. *Id.* at 9.

10. See, e.g., Michael Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARVARD NATIONAL SECURITY JOURNAL 5 (2010).

11. See Nils Melzer, *The ICRC's Clarification Process on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, http://www.oas.org/dil/esp/XXXVI_curso_The_ICRC_Clarification_Process_Nils_Melzer.pdf (last visited Nov. 30, 2010); Dieter Fleck, *Direct Participation in Hostilities by Nonstate Actors and the Challenge of Compliance with International Humanitarian Law*, PUBLIC DIPLOMACY MAGAZINE, Summer 2010, at 40, *available at* <http://publicdiplomacymagazine.com/direct-participation-in-hostilities-by-nonstate-actors-and-the-challenge-of-compliance-with-international-humanitarian-law/>; Dapo Akande, *Clearing*

the Fog of War? The ICRC's Interpretive Guidance on Direct Participation in Hostilities, 59 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 180 (2010).

12. Interpretive Guidance, *supra* note 8, at 27.

13. *Id.* at 46.

14. *Id.* at 56–57. *Contra* Michael Schmitt, *Deconstructing the Direct Participation in Hostilities: The Constitutive Elements*, 42 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 697, 732–34 (2010).

15. Interpretive Guidance, *supra* note 8, at 77.

16. *Id.* at 82.

17. See the series of articles in Forum, *The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, 42 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 637 (2010).

18. *Id.* at 831.

19. For an explanation of the background to the document and the document itself, see the Swiss Federal Department of Foreign Affairs website at <http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intla/humlaw.Par.0078.File.tmp/Montreux%20Broschuere.pdf>.

20. Available at <http://www.news.admin.ch/NSBSubscriber/message/attachments/21143.pdf>.

21. Common Article 3 to the four 1949 Geneva Conventions applies to all cases “of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.” See, e.g., Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31, *reprinted in* THE LAWS OF ARMED CONFLICT, *supra* note 1, at 459, 461.

22. U.N. Charter pmb1.

23. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948), *reprinted in* BASIC DOCUMENTS ON HUMAN RIGHTS, *supra* note 5, at 23.

24. *Supra* note 5.

25. International Covenant on Civil and Political Rights arts. 4, 8, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966), 999 U.N.T.S. 171, *reprinted in* BASIC DOCUMENTS ON HUMAN RIGHTS, *supra* note 5, at 358, 359, 361.

26. Additional Protocol I, *supra* note 3.

27. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609, *reprinted in* THE LAWS OF ARMED CONFLICT, *supra* note 1, at 775.

28. CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2 volumes) (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

29. See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 106–13 (July 9); *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 116, ¶ 216 (Dec. 19).

30. U.N. Human Rights Committee, General Comment No. 29, States of Emergency (Article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001).

31. There have been a number of cases arising out of the situation in eastern Turkey, Chechnya and northern Cyprus. There are also cases waiting hearings arising from the Georgia/Russia conflict of August 2008.

32. See RUPERT SMITH, *THE UTILITY OF FORCE: THE ART OF WAR IN THE MODERN WORLD* (2005).

VIII

Direct Participation in Hostilities and the Interoperability of the Law of Armed Conflict and Human Rights Law

Françoise J. Hampson*

I. Introduction

There is an ongoing debate as to how to make the law of armed conflict (LOAC) and human rights law (HRsL) interoperable. The International Committee of the Red Cross's (ICRC's) *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* has complicated that process.¹ This article seeks to explain why there is a problem and to propose possible solutions. It only deals with the specific issues of targeting and opening fire. It does not address the issue of detention.² Before embarking on that examination, it is first necessary to identify a range of assumptions and assertions on which the analysis will be based. Certain distinctions within LOAC will then be explored, because of their impact on the rules on targeting. The article will then examine how the decision to open fire is analyzed under HRsL. Options available to make LOAC and HRsL interoperable will be considered before finally suggesting a solution.

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II. Assumptions and Assertions

This section identifies certain issues relevant to the discussion that, for reasons of length, it will not be possible to discuss in any detail.

The Applicability of LOAC Does Not Have the Effect of Making HRsL Inapplicable³

There is overwhelming evidence to support this general proposition, including two advisory opinions and one judgment in a contentious case of the International Court of Justice (ICJ).⁴ The ICJ has suggested that, when both bodies of rules are applicable, LOAC is the *lex specialis*.⁵ It is unclear as yet both precisely what this means and also how it is to be operationalized.⁶ While the United States and Israel have argued that the applicability of LOAC displaces that of HRsL, it appears unlikely that they can claim to be “persistent objectors.”⁷

One of the most important implications of the co-applicability of LOAC and HRsL is that bodies charged with monitoring compliance with HRsL would appear to have the competence to assess whether a killing was a breach of HRsL, even if they have to interpret HRsL in the light of LOAC. The bodies in question include not only monitoring mechanisms that owe their authority ultimately to the United Nations Charter, such as the UN Special Procedures mechanisms,⁸ but also monitoring bodies established under treaties. Those likely to have the most impact in practice are treaty bodies, which can receive individual complaints and deliver binding legal judgments—in other words, the three regional human rights courts.⁹ This does not mean that the opinions of other bodies, notably the Human Rights Committee under the International Covenant on Civil and Political Rights, are not important.¹⁰ The jurisdiction of the regional human rights courts may be limited on other grounds, most notably the uncertain scope of the extraterritorial applicability of HRsL.

The Scope of the Extraterritorial Applicability of HRsL

Unlike the first issue, this question is far from settled.¹¹ It appears to be clear that States have to apply their human rights obligations in territory that they occupy, at least in the case of stable or settled occupation.¹² It is also well established that States have to apply their human rights obligations to persons in their physical control, such as detainees.¹³ What is not clear is the extent to which a State’s human rights obligations apply to acts within the control of State agents where the harm to the victim is foreseeable but the victim is not within their physical control. Such a situation arises when the armed forces of State A in State B deliberately fire at X from a distance of eight hundred yards or intentionally strike a building in

State B, knowing that there are a number of civilians inside, even if they do not know their names.¹⁴

This issue, unlike the previous question, arises purely as a matter of HRsL; it has nothing to do with the co-applicability of LOAC. It only arises in the case of those human rights treaty bodies whose competence is limited to alleged victims “within the jurisdiction” of the respondent State.¹⁵ The UN Special Procedures and the Inter-American Commission of Human Rights, in exercising its functions under the Organization of American States Charter, are not subject to such a limitation.¹⁶ To date, this restriction on the scope of jurisdiction has been most significant in the case of the European Court of Human Rights (ECtHRs) and, to a lesser extent, the UN Human Rights Committee. Important cases, arising out of the conflict in, and occupation of, Iraq in and after 2003 and the conflict between Georgia and Russia in 2008, are currently pending before the former body. It may clarify that Court’s currently incoherent caselaw.¹⁷ It requires a rational path to be found between two equally objectionable extremes. It seems self-evident that a State should not be allowed to do extraterritorially what it is prohibited from doing within its own borders.

It is equally obvious that a State should not be found responsible for acts, omissions and situations over which it exercises no control. An important distinction in HRsL, that between positive and negative obligations, might be relevant in this context. By “negative obligations” is meant the obligation to respect a right, usually by not doing something prohibited. The State also has an obligation to protect individuals from the risk of a right being violated. This requires the State to take measures to protect the individual from potential harm at the hands of State agents or third parties. It represents a positive obligation to protect. The nature of certain rights means that the positive obligation can only be fulfilled by the State exercising the type of control it is expected to have in national territory. The delivery of the right to education requires machinery for setting up schools, training teachers, paying teachers and providing various materials. It is self-evident that State A, engaged in a military operation in State B, cannot deliver such a right to the population. The situation would be different if the armed forces were in effective control of part of the State’s territory over a significant period of time and failed to address in any way the educational needs of the population, or if State A’s forces, present in State B with the consent of the State, failed to protect schools from foreseeable attack. This might suggest that the only relevant test is one of situational control. While that is certainly relevant, it is inadequate to address certain situations when the State freely chooses to undertake an act that it could not do lawfully in its own territory. Take the example of State A, which is engaged in a military operation in State B, but which is not in control of the territory in which it is fighting. Its armed

forces deliberately fire on X at a distance of eight hundred yards. They are not in physical control of X. They are, however, in control of the acts of the armed forces whose behavior is decisive in determining whether or not X is killed. The issue concerns a negative obligation, the obligation not to use potentially lethal force except in defined circumstances. The State does not require elaborate machinery in order to deliver the right; its agents simply have to refrain from opening fire.

It should be remembered that, while much of the discussion of the issue concerns the control exercised by the State acting extraterritorially, the treaty language does not require the alleged perpetrator to be within the control of the State. It requires that the victim should be within the jurisdiction of the respondent State. It should also be remembered that the question here is not whether the situation should be analyzed in terms of HRsL or LOAC but whether HRsL is applicable *at all*. If it is not, certain human rights bodies do not have jurisdiction. If they do have jurisdiction, a second and separate question arises. The body then has to determine whether its analysis of HRsL has to be undertaken in the light of LOAC. That might mean that there was a violation of HRsL only if there were a violation of LOAC. In effect, but not in form, the human rights body would then be enforcing LOAC. It could only do so, however, if it had jurisdiction.

This article will not discuss the issue further but it must be borne in mind throughout the subsequent discussion. It has significant implications for the extent of the problem of co-applicability.

The Geographical Scope of the Applicability of LOAC

Historically, there seems to have been an assumption that LOAC applied throughout the territory of the State involved in the conflict or in whose territory the conflict was occurring.¹⁸ In the case of international armed conflicts (IACs), geographical limitations on the scope of applicability of LOAC may be achieved in other ways. For example, during the Gulf War 1990–91, the coalition forces appear not to have targeted roads and bridges in Iraqi Kurdistan. They were not used to contribute to the Iraqi military effort and their destruction or neutralization would therefore not have delivered a definite military advantage.¹⁹ In IACs, it may be preferable to assume that LOAC applies throughout the relevant territories and to use the definition of a military objective to limit the geographical scope of the fighting on a factual basis.

The situation in the case of non-international armed conflicts (NIACs) is significantly different, whether the State is a party to the conflict or not.²⁰ Although it is important that forces needing the protection of LOAC should get it, it is equally important that a LOAC paradigm should only be used when it is necessary. Emergency measures that are genuinely required are usually accepted, however

reluctantly, by the majority of the population. That population is, however, likely to be alienated by reliance on emergency measures not perceived to be necessary.

On that basis, NIAC rules should apply to those parts of the territory in which fighting is occurring and to conflict-related activities in other parts of the territory. Imagine, for example, that there is a conflict in one province of State A. It introduces internment or administrative detention as an emergency measure. That should not apply to the detention of individuals in other provinces, unless an individual is detained there on account of activities in the province where the conflict is occurring.

The caselaw of the International Criminal Tribunal for the former Yugoslavia (ICTY) suggests support for both the general applicability of LOAC throughout the territory and also a more restricted geographical scope for the applicability of NIAC rules.²¹ A study of State practice, at least with regard to NIACs within the territory of the State, might suggest a more restrictive approach. As a matter of impression, when a conflict is only occurring in part of its territory, a State often only declares a state of emergency in those parts of national territory affected by the conflict.²² That may be principally the product of domestic, notably constitutional-law, concerns or of HRsL, but that would not exclude its possible relevance to the applicability of LOAC.²³

The process of establishing customary law in NIACs is far more complicated than in IACs. In IACs, the whole of the relevant discourse is through the vocabulary of LOAC. That is the principal source of international legal obligations.²⁴ Domestic law is likely to be of limited relevance, particularly to extraterritorial conduct.²⁵ In the case of internal NIACs, the constraints on the conduct of the domestic authorities are principally articulated through domestic law and HRsL.

Confining emergency measures to the parts of the territory where the conflict is occurring and conflict-related activities elsewhere may be the approach currently favored by human rights bodies dealing with derogation during states of emergency.²⁶ Initially, the ECtHRs emphasized that, in order to justify derogating at all, the threat had to be to “the life of the nation” as a whole.²⁷ This might have been thought to imply that the conflict had to be occurring everywhere, thereby justifying the applicability of LOAC everywhere. More recently, the ECtHRs has addressed the situations in Northern Ireland and southeast Turkey.²⁸ At no point was the argument raised that the two States could not derogate because the conflict was only occurring in part of their territories. At the same time, when dealing with cases arising in other parts of the respective States, neither the State itself nor the Court suggested that they should apply the emergency measures in those other areas.

When the applicability of LOAC depends, among other elements, on the level or intensity of the violence, as is the case with Common Article 3 to the Geneva

Conventions of 1949 and Additional Protocol II of 1977, it is already the case that the applicability can vary at different times. That may be relevant when determining whether a geographical limitation to the applicability of NIAC rules is, in principle, acceptable.

In the rest of the article, it will be assumed that NIAC rules only apply to the areas of the territory in which the conflict is occurring and to conflict-related issues elsewhere. In other parts of the territory, domestic law, including relevant human rights obligations of the State, will be applicable.

The Function of Legal Rules in Situations of Armed Conflict

The law does not exist to remove the decision-making authority of the military commander from him. The law determines the bottom line, below which conduct is unlawful. Just because conduct is not unlawful does not make it wise or apt for achieving the military purpose. It is possible that a commander could be prosecuted on this basis, under national military law, for action that did not constitute an international crime.²⁹

The flip side of these propositions is that the law cannot be based on a best-case scenario. In normal circumstances, a decision on opening fire is based on a law and order paradigm.³⁰ That means that it should be taken as a last resort and based on the behavior of the person targeted. It is dependent on the immediacy and severity of the threat that person poses at the time. In most situations of armed conflict, that is inappropriate as a bottom line. It may well be that most of the time and in most of the territory, even during an emergency, a law and order paradigm is appropriate, but in other situations it will not be. Rules are more likely to deliver the desired result if they are suited to the situation in which they are to be applied and for which they have been designed. In other words, just as in peacetime it is in everyone's interest, including that of military forces, to limit decisions on opening fire to a law and order paradigm, in many situations of armed conflict it is in everyone's interest, including that of the civilian population, for such decisions to be based on a LOAC paradigm.

These principles need to inform the operationalization of the relationship between HRsL and LOAC. To assert an unrealistic protection of civilians in situations of armed conflict based on HRsL is not likely to enhance their protection but rather to result in unrealizable expectations on the part of civilians and in increased violation of the rules on the part of the armed forces. If some rules are perceived to be unrealistic, this is likely to lessen respect for those rules that can be applied in practice. This is not to argue that at the first sound of gunfire LOAC should displace HRsL. The circumstances in which an armed conflict paradigm should replace a law and order paradigm will be considered further below. All that is being asserted

here is, first, that there are circumstances in NIACs when LOAC is the more appropriate paradigm and, second, just because the law allows a soldier to open fire does not mean that it is necessarily the right thing to do in a particular situation in which LOAC is applicable.

III. Distinctions within LOAC Relevant to the Rules on Targeting and Opening Fire

Three distinctions need to be considered here: first, that between Hague law and Geneva law; second, that between treaty law and custom; and, third, that between the literal meaning of “direct participation in hostilities” (DPH) and the ICRC’s *Interpretive Guidance*.

Hague Law and Geneva Law

Before 1977 and the adoption of the Additional Protocols to the Geneva Conventions of 1949, particularly Protocol I on international armed conflicts, any discussion took the distinction between Hague law and Geneva law for granted. The rules were usually to be found in different treaties, making the distinction both necessary and relatively straightforward. The usual way of describing the substantive content of the rules was that Hague law dealt with means and methods of fighting and Geneva law with the protection of victims who were, by definition, in the power of the other side. In fact, the rules were even more distinct than this might suggest. Hague law and Geneva law functioned differently as legal subsystems. This was a product of the issues with which each dealt, but it went much deeper than that.

For reasons of brevity, it will be necessary to discuss the differences by way of sweeping generalizations. Even if they may be subject to criticism, that does not mean that there is not an essential truth at their heart. Hague law is directed to the military operator. It guides his decision making at the time. It deals principally with the places where, and times when, fighting is occurring. The rules tend to identify the considerations that must be taken into account and provide guidance as to how they are to be balanced, rather than simply prohibiting a particular outcome.³¹ The rules are a detailed articulation of general principles, such as the principles of distinction, proportionality and military necessity.

Geneva law, on the other hand, is focused on the actual or potential victim, rather than the perpetrator. Many, but by no means all, of the issues that it addresses arise away from the immediate field of battle. The law tends to prohibit certain results or outcomes, usually by requiring certain forms of behavior. The bottom line and the most appropriate behavior in a particular situation are likely to be much closer in the case of Geneva law than Hague law. If Hague law is

principally directed at the individual operator, Geneva law appears to focus more on the obligations of a party to the conflict. Geneva law provides answers or required outcomes, but Hague law provides tools enabling the operator to arrive at an answer in a specific situation. To that extent, Geneva law appears to address *types* of situations, rather than specific ones. The nature of Geneva law may make it easier to mesh with HRsL than is the case with Hague law. If, in the case of Geneva law, it is a question of finding an accommodation between LOAC and HRsL, in the case of a significant portion of Hague law it is a matter of making a choice. That is a product not only of the content of the rules but also of the nature of the separate legal subsystems.

The internal logic of the two subsystems is therefore significantly different, with considerable implications for their functioning as systems. This is reflected in presumptions, qualifications and limitations contained within the rules. If a goal of the Geneva Conventions is the protection of victims, it may mean that qualifications to a rule have the nature of exceptions and suggests that they should be interpreted restrictively. This would reinforce the parallel with HRsL. Hague law has no overarching goal. It seeks rather to establish a balance, one between humanitarian considerations and military necessity. To that end, there can be no default position or presumption in favor of either side of the equation. The rule itself contains the balance. There can be no appeal to military necessity outside the formulation of the rule. Equally, as a matter of law, there can be no appeal to humanitarian concerns outside the rule. There is no need to interpret limitations³² restrictively. They should be given their natural meaning.

Additional Protocol I appeared to merge Hague law and Geneva law. It is not, however, possible to “merge” two sets of rules that function in quite different ways. It might be possible to change each set of rules and to produce an entirely new type of rule, but that was not done. Rather, Protocol I contained some sections and provisions of a Hague-law type and some of a Geneva-law type. Additional Protocol II, which is largely a development of Common Article 3 of the Geneva Conventions of 1949, is principally an example of Geneva law, but it does contain some Hague-type provisions, unlike Common Article 3.

The specific question being explored in this article is targeting and the decision to open fire. Is that a matter of Hague law or Geneva law? While it might be tempting to see civilians at risk from the fighting as an additional class of victim to be protected under Geneva law, it is submitted that that analysis is flawed. The categories of victims protected by the four Geneva Conventions of 1949 share two characteristics. They have been adversely affected by the armed conflict and they are vulnerable because they are in the power of the other side.³³ Their protection does not, by and large, affect the conduct of hostilities, although it will be

necessary to divert resources that could have been used for other purposes to effect their protection.³⁴ Civilians in need of protection from the fighting do not fit within this framework. Their vulnerability arises not from the adversary but from the fact of the fighting. They need protection from their own side as much as from the enemy. Any measures to improve their protection will have a direct impact on the conduct of hostilities. In other words, rules on targeting and opening fire form part of Hague law, even if part of their object is the protection of the civilian population.

The Distinction between Treaty Law and Customary Law in LOAC

Treaty Law

Geneva Law. There is detailed and extensive provision in treaty law for Geneva-law-type issues in IACs. There is fairly detailed provision for such issues in treaties applicable in NIACs, with two significant exceptions—grounds for detention and the status of members of opposing organized armed groups. This is a logical consequence of the situations in question. Domestic law, possibly emergency law, is available to deal with the grounds for detention, at least in the case of internal NIACs. No sovereign State claiming a monopoly on the lawful use of force can logically admit that organized armed opponents have a special status or are acting other than unlawfully. To do so would be to recognize the belligerency, thereby making the conflict effectively subject to the IAC rules. There are some NIAC Geneva-type rules across the very low threshold of Common Article 3 of the Geneva Conventions of 1949. Those basic rules are further developed in situations that cross the significantly higher threshold for the applicability of Additional Protocol II.

Hague Law. The situation is very different in the case of Hague law. Again, there is detailed regulation of the means and methods of fighting in treaties applicable in IACs. There are no treaty rules of a Hague-law type in Common Article 3 NIACs, however, and only very basic provisions in NIACs to which Additional Protocol II is applicable. The one exception is rules on specific conventional weapons, where the recent trend in treaty law is to make the same rules applicable in IACs and NIACs.³⁵ The treaties do not explain whether NIACs refer to all such conflicts or only those that cross the threshold of Additional Protocol II.³⁶

Customary Law

Geneva Law. Assuming that the ICRC's *Customary International Humanitarian Law*³⁷ study, reinforced by the caselaw of the ICTY and International Criminal Tribunal for Rwanda (ICTR) and the Statute of the International Criminal Court in the specific field of criminal rather than civil obligations, offers a fairly accurate guide to customary law rules of a Geneva-law type, there is a close match between treaty provisions and customary law in both IACs and NIACs. Again, it is necessary to exclude rules on grounds for detention and the status of organized armed opponents in the case of NIACs.

Hague Law. The situation is very different in the case of Hague-law rules. There is a significant overlap in treaty and customary law rules of a Hague-law type in IACs but not in NIACs. The caselaw of the ICTY and ICTR and the Statute of the International Criminal Court, together with the customary law study, suggest that there are extensive and detailed customary rules of a Hague-law type in NIACs, even though there are no or only rudimentary treaty provisions. In reaching such conclusions, not one of those sources distinguishes between Common Article 3 NIACs and Additional Protocol II NIACs. This is surprising given that there are no Hague-law-type treaty rules in Common Article 3 NIACs. They only appear in treaty law when a NIAC crosses the very high threshold for the applicability of Additional Protocol II. The most remarkable legal source in this respect is the Statute of the International Criminal Court, the only source based on inter-State negotiation. The negotiators took as their criterion for inclusion in the list of war crimes that the act was regarded as a war crime in customary international law.³⁸ The list in the Statute of Hague-law war crimes in NIACs is much shorter than that in IACs and, most notably, does not include launching an indiscriminate or disproportionate attack. The negotiating States are likely to have been influenced by the customary war crimes in NIACs "discovered" by the ICTY and ICTR. It is nevertheless surprising that in the definition of NIACs in the Statute no distinction is drawn between Common Article 3 and Additional Protocol II situations.³⁹ It would be rash to assume that the Statute of the International Criminal Court is evidence that the distinction no longer matters. The last time that States elaborated general rules for NIACs, they went out of their way to create a threshold of applicability much higher than Common Article 3. Nor should it be assumed that the ICRC's customary law study is not controversial. In fact, that is far from being the case, particularly with regard to Hague-law-type issues.⁴⁰

It is suggested that alleged customary NIAC rules of a Hague-law type that do not bear a close relationship to the NIAC treaty rules should be handled with some

care. The problem is not that such rules risk posing an undue and unwarranted obligation on States;⁴¹ it is rather that the alleged customary rules may imply a shift from a law and order paradigm to an armed conflict paradigm at an inappropriately low level of disruption. Since Geneva-law rules are focused on the protection of victims and bear a significant similarity to the approach of HRsL, their applicability at the Common Article 3 threshold does not appear to be too problematic. It is specifically customary rules of Hague law that give rise to this difficulty. More particularly, it is LOAC rules that *permit* action to be taken, rather than LOAC rules that prohibit attacks against certain types of targets or the use of certain weapons, that cause the problem.

When the alleged applicability of customary Hague rules in a NIAC means that objects indispensable to the civilian population cannot be targeted or that anti-personnel land mines cannot be used, there is clearly no conflict between such a rule and HRsL. The situation is very different if the applicability of customary Hague rules in all NIACs means that an individual can be targeted by virtue of being a member of an organized armed group exercising a continuous combat function—in other words, by reference to status—rather than on account of the threat posed by his behavior.⁴² In low-intensity armed conflicts, the situation is likely to be made worse if armed forces target by reference to status rather than behavior. Mistakes and “collateral casualties” may be even less well tolerated by the civilian population than in high-intensity NIACs. The issue is not whether armed forces can be used to deal with organized armed violence during an emergency, but whether whatever forces are used are applying rules based on a law and order paradigm or an armed conflict paradigm.

Consider the example of “Bloody Sunday.”⁴³ For the sake of argument, let us assume, first, that the events happened today; second, that the situation in (London)Derry is to be characterized as coming within Common Article 3 of the Geneva Conventions;⁴⁴ and, finally, that it is lawful under LOAC rules to open fire against an individual because of his membership in an organized armed group exercising a continuous combat function.⁴⁵ Since the armed forces are unlikely to have membership lists of illegal organized armed groups, a membership test has to be understood as referring to presumed membership. It is not clear how that is to be determined. Can it seriously be suggested that it would be appropriate if international law allowed the British armed forces to open fire against any presumed member of the IRA, irrespective of what he was doing at the time? Would it be sufficient if international law gave them that authority but a commander chose to act within greater restrictions than the law allowed and ordered his forces only to open fire in self-defense?⁴⁶ In other words, should such discretion have been allowed to a military commander or should international law have required him to act within a

law and order paradigm? That is the kind of problem thrown up by the alleged applicability of customary Hague rules in all NIACs, rather than in those of sufficient intensity as to make Additional Protocol II applicable.

The Literal Meaning of “Direct Participation in Hostilities” and the Interpretive Guidance

According to treaty law, at least in the case of IACs, there exist only two possible statuses under LOAC in relation to the law on the conduct of hostilities: combatant and civilian.⁴⁷ The term “combatant” does not describe persons who fight, but persons who are entitled to fight. A combatant has the right to kill and, equally, can be killed by opposing combatants by virtue of having that status.⁴⁸ It does not matter what he is doing at the time he is killed. Only combatants can be targeted by virtue of status alone. The only other people who can be the target of attack are persons who are taking a direct part in hostilities. The status of combatant exists only in IACs. While it is readily understandable that members of an organized armed group are not regarded as combatants, implying as it does an entitlement to fight, this does raise an interesting question about the status of members of the State’s armed forces.⁴⁹ If there is no combatant status in NIACs, are they civilians? Although an individual has no right in international law to participate in a NIAC, he is not committing an international crime by doing so, but obviously he is very likely to be committing a crime under domestic law. Similarly, he will not commit an international crime if he kills a member of the State’s armed forces or a member of another organized group, but he will commit an international crime if he breaches the rules on the conduct of hostilities by intentionally killing a civilian, for example.

The treaty rule that addresses DPH is the same in IACs and NIACs. Civilians enjoy the protection afforded against the effects of hostilities “unless and for such time as they take a direct part in hostilities.”⁵⁰ Whatever the difficulties regarding the time during which a person can be attacked or the conduct that constitutes “taking a direct part,” it is clear that the person has to be doing something that makes him a target of attack. In other words, that depends on behavior and not status. Two different types of problems confront armed forces trying to determine who can be targeted. First, the situations in which armed forces find themselves have evolved significantly since 1977. “A continuous shift of the conduct of hostilities into civilian population centres has led to an increasing intermingling of civilians with armed actors and has facilitated their involvement in activities more closely related to military operations.”⁵¹ A more recent phenomenon is the outsourcing of traditionally military functions. This could result in people appearing to be members of the military and to be engaged in hostilities when that is not,

in fact, the case. Alternatively, people could appear to be civilians but also appear to be involved in military activities. In other words, the factual situations in which members of the armed forces find themselves are increasingly confused. This must make it difficult to apply any rule, even if they knew what the rule meant.

The second difficulty concerns the formulation of the rule itself. What is the period of time covered by “unless and for such time as”? When does it start and when does it end? Which activities constitute “participation” and what is the distinction between direct and indirect participation?

It is likely that there is an additional element of frustration and that is with the content of the rule. Imagine that there is significant evidence that X has been and is actively participating in hostilities, but the evidence is not of a quantity, type or character as to enable detention on a criminal charge. The armed forces cannot target X unless they catch him in the act of participating, even though he may be responsible for many deaths.

In these circumstances, it is not surprising that the ICRC sought to clarify the meaning of the rule.⁵² The *Interpretive Guidance* was the product of extensive consultation with experts who were consulted in their personal capacity, but is exclusively the responsibility of the ICRC. Much of the content, particularly in relation to IACs, is relatively uncontroversial. In non-IAC situations, however, that is not the case. In those instances, the *Guidance* is very controversial from various and sometimes conflicting standpoints.⁵³ The clarification of the constitutive elements of direct participation and of the beginning and end of direct participation will not be considered further here. What will be examined is the withdrawal of civilian status from members of organized armed groups in NIACs and its implications for the interoperability of LOAC and HRsL.

The *Interpretive Guidance* treats civilians differently in IACs and NIACs. Since an IAC by definition involves at least two States on opposing sides, there is no shortage of “parties” to such a conflict. The *Interpretive Guidance* restates the usual test for combatant status.⁵⁴ All other persons are civilians but they may forfeit protection from attack if they take a direct part in hostilities. In other words, loss of protection depends on the behavior of the individual. The *Interpretive Guidance* clarifies both the meaning of direct participation and also the time during which protection is lost. These clarifications have implications for loss of protection by civilians in IACs, but loss of protection is still dependent on behavior.

The situation with regard to NIACs is very different. A person is no longer to be regarded as a civilian if he is a member of an organized armed group of a party to the conflict. Members of an organized armed group constitute the armed forces of a non-State party to the conflict and consist only of individuals who exercise continuous combat functions.⁵⁵ This clearly means that an individual can be targeted

on account of his status as a presumed member of such a group and not on account of his behavior at the time he is targeted. Given the greater flexibility introduced as a result of the clarification of “unless and for such time as” and “direct participation,” it is not clear why it was thought necessary to address the status of a fighter in a NIAC at all. After all, no change appears to have been introduced to the status of a civilian who takes a direct part in hostilities in an IAC. That possibly represents an oversimplification. In an IAC, civilians who belong to an armed group that does not belong to a party to a conflict can indeed only be targeted if they take a direct part in hostilities. Many such groups will, however, belong to a party to the conflict, even if they do not form part of its regular armed forces. That party, which is by definition a State, will have responsibility in international law for the conduct of those armed forces.⁵⁶ In other cases, the armed group may belong to a party that is not a State but which is involved in an armed conflict against a party to the IAC. The *Interpretive Guidance* suggests that in such a case two armed conflicts will be occurring in parallel; an IAC between two States and a NIAC between the non-State party and one of the States parties. In that case, who can be targeted will be determined by the *Interpretive Guidance* principles applicable in NIACs.⁵⁷ If anything, that reinforces the point that the impact of the *Guidance* proposal only arises in NIACs.

The principal justification suggested for denying civilian status to members of organized armed groups exercising continuous combat functions, while not also granting them combatant status, is the principle of distinction.⁵⁸ There is a need to distinguish between civilians and those who act like the armed forces of a party to the conflict. It is said that Common Article 3 to the Geneva Conventions of 1949 implies that both the State and non-State groups have armed forces.⁵⁹ Less convincingly, it is argued that Additional Protocol II makes a distinction between those who take a direct part in hostilities and the forces that are capable of conducting sustained and concerted military operations.⁶⁰ The *Interpretive Guidance* acknowledges that it is difficult to establish the membership of an organized armed group, in contrast to membership of the armed forces or other official armed group.⁶¹ It is difficult to see how “continuous combat function” can be established other than by conduct, in which case we are driven back to a behavior test. It should be emphasized that loss of status does not depend on membership of a party to the conflict, or even of membership of an armed group belonging to such a party. It is also necessary to establish that the individual exercises a continuous combat function.

Superficially, it might appear that the proposal supports the principle of the equality of belligerents, in that both parties are recognized as having armed forces. In fact, however, the members of an organized armed group exercising continuous

combat functions lose civilian immunity from attack but do not gain the privileges of a combatant.

It could, perhaps with equal plausibility, be argued that the principle of distinction is based on the idea that there are only two statuses in LOAC: that of combatant and that of civilian.⁶² A combatant is someone who has the right to take part in the hostilities and who therefore has the right to kill opposing combatants. Anyone who is not a combatant, therefore anyone who does not have those rights, is a civilian. In that case, members of organized armed groups must be civilians unless the opposing party recognizes their combatant status. Immunity from attack could be lost but only on the basis of the individual's behavior.

The *Interpretive Guidance* just refers to NIACs and does not distinguish between Common Article 3 NIACs and Additional Protocol II NIACs. That is why the "Bloody Sunday" example discussed earlier represents a problem. The *Interpretive Guidance* approach would be easier to defend if it were restricted to situations above the threshold of applicability of Additional Protocol II, at least with regard to the level and nature of the violence.⁶³

At present, there are two principal difficulties for armed forces: the scope of the rule and uncertain facts. Other aspects of the *Interpretive Guidance* address the temporal and functional issues. It is not clear why it was thought necessary to address the question of status before determining the impact of those clarifications. The bigger difficulty is uncertainty about the facts. It is hard to see how the *Guidance* helps there. The ability to target by reference to status depends on the ability to establish that the person targeted was a member of an organized armed group that belonged to a party to the conflict and the person fulfilled a continuous combat function within the group. This is likely to pose a real challenge to armed forces if such a determination is to be based on fact rather than a vague hunch.

Perhaps as a counterweight to the withdrawal of civilian status from certain fighters, the *Interpretive Guidance* emphasizes that, when an individual can be the target of an attack, the kind and degree of force used must "not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances."⁶⁴ The *Interpretive Guidance* suggests that, in circumstances when it would not increase the risk to the opposing armed forces or to other civilians, the threat posed by the individual might be neutralized by measures short of the use of lethal force, notably detention.⁶⁵ It is submitted that this represents dangerous category confusion.⁶⁶ Key features of a law and order paradigm are, first, that force is used as a last resort and, second, that priority should be given to an attempt to detain. The essential feature of an armed conflict paradigm, as far as Hague-type rules are concerned, is that there is no obligation to detain. An individual can be targeted by virtue of his status, irrespective of what he is actually doing at the time, or on the basis

of his behavior at the time. As a matter of law, the combination of a right to use deadly force and a requirement to use the minimum force necessary would appear to be incoherent.⁶⁷

It is submitted that there is a better solution, even in purely LOAC terms. It would also have the additional benefit of making easier the operationalization of the relationship between LOAC and HRsL.

IV. A Comparison of the Basis for Opening Fire under HRsL and LOAC

As indicated above, the majority of human rights treaties prohibit arbitrary killings without defining the term. The meaning to be given to “arbitrary” becomes apparent through an examination of the practice of treaty bodies in exercising their monitoring functions and particularly through the caselaw arising out of individual complaints. In this context, it is also relevant to consider the analysis in the report to the UN Human Rights Council of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions.⁶⁸

It is clear from the caselaw that the prohibition on arbitrary killings is applied strictly in the case of deaths resulting from the acts of State agents.⁶⁹ The only basis for opening fire is the behavior of the individual at the time, including the risk posed by the individual to himself or others. It is conceivable that it might, in limited circumstances, be interpreted more broadly. It might be possible to argue that the agent could justify opening fire against an individual on account of the general risk he poses, rather than the risk posed by his behavior at the time.⁷⁰ It would, however, be necessary to establish why, if his behavior is not dangerous at the time, he cannot be detained. The use of potentially lethal force has to be a last resort.

The European Convention for the Protection of Human Rights (ECHR) is unusual in that it defines exhaustively the only circumstances in which resort may be had to potentially lethal force.⁷¹ All those circumstances are based on a law and order paradigm, and are based on the behavior of the individual at the time. Furthermore, the test is not that the use of potentially lethal force is reasonably necessary but that it is absolutely necessary.⁷² In addition, the Convention requires that the State take measures to protect the right to life. This has been interpreted, in the case of planned operations, as requiring security forces to take measures to try to prevent the need to resort to potentially lethal force⁷³ and to protect other civilians in the vicinity from the risk of being injured or killed.⁷⁴ This can result in the State being held responsible for a death that resulted from the use of inappropriate weapons.⁷⁵

All the treaty bodies require both lawful grounds for resorting to potentially lethal force and also that the force used be proportionate. This does not mean

proportionality as it is understood in LOAC but that the force used is proportionate to the risk posed by the individual at the time.⁷⁶

The analysis has so far considered the requirements of HRsL in a “normal” context. The question arises of how the rules are modified, if at all, by the existence of a situation of emergency or armed conflict. All the treaty bodies, other than the ECHR, provide that the prohibition of arbitrary killing is non-derogable. *Prima facie*, this means that it applies also in such situations. It is, however, possible that the meaning of “arbitrary” has sufficient flexibility to apply in a different way in such situations. There appears as yet to be no human rights caselaw involving killings arising out of circumstances in which LOAC indisputably applies a status test—in other words, in IACs. There are relevant cases currently pending before the ECtHRs. There is, however, caselaw arising out of situations in which the *Interpretive Guidance* would suggest that targeting by reference to status is legitimate—in other words, the targeting, in every type of NIAC, of a member of an organized armed group exercising a continuous combat function. The author is not aware of any such situation where the State invoked LOAC or the State claimed such a basis for opening fire. On the contrary, States have argued, successfully or otherwise, that the behavior of those targeted justified the resort to potentially lethal force and/or that the force used was proportionate.

The ECHR is again different in that it provides, “No derogation from Article 2, except in respect of deaths resulting from lawful acts of war . . . shall be made under this provision.”⁷⁷ This either represents a possible derogation or a defense. No State has ever invoked the article, even where the alleged violation of Article 2 occurred during the course of an armed conflict to which Common Article 3 of the Geneva Conventions was arguably applicable.

It is submitted that human rights bodies appear to be wedded to a behavior test. Even assuming that they wish to give effect to the directions of the ICJ that, when both LOAC and HRsL are applicable, they should apply LOAC as the *lex specialis*, they are likely to be reluctant to go back on existing caselaw, either in NIACs generally or specifically in the case of NIACs between the threshold of Common Article 3 and that of Additional Protocol II.

The basis of targeting in LOAC will be set out baldly here, since it has already been the subject of discussion. In IACs, there appears to be a close relationship between the rules of treaty law and customary law. Under both, the following may be targeted by virtue of their status as combatants: members of the armed forces of a party to the IAC, members of a militia belonging to that party and members of a *levée en masse*. Others may only be targeted if they take a direct part in hostilities, either as interpreted on the basis of treaty law or as interpreted in the light of the *Interpretive Guidance*.

In the case of NIACs, there is a marked difference between treaty law and what some allege to be customary law. Under treaty law, there is no guidance as to who may be targeted and on what basis under Common Article 3 of the Geneva Conventions. That presumably falls to be regulated by domestic law and HRsL. Where a NIAC crosses the much higher threshold necessary to make Additional Protocol II applicable, a person may only be targeted for taking a DPH. A person cannot be targeted by virtue of his status.

An analysis of the position under customary law requires a distinction to be drawn between customary law without the *Interpretive Guidance* and customary law taking it into account. The expansive view, based on the *Customary International Humanitarian Law* study, the caselaw of the ICTY and ICTR, and the provisions of the Statute of the International Criminal Court, suggests that in *all* NIACs a person can be targeted only if he takes a direct part in hostilities. This is not the same as the human rights test based on the threat posed by the behavior of the individual at the time, but it is at least based on behavior. It might be possible for human rights bodies to accommodate themselves to that slight widening of the concept of threat, particularly those bodies applying a prohibition of "arbitrary killings." The picture changes if we take account of the *Interpretive Guidance*. On that basis, a person may be targeted in *all* NIACs either on account of his taking a direct part in hostilities or because he is a member of an organized armed group belonging to a party to the conflict and exercising a continuous combat function. That last element involves targeting on the basis of status and doing so in a situation in which human rights bodies have hitherto applied, without apparent controversy, a behavior test. That is likely to complicate rather than to facilitate the operationalization of the relationship between LOAC and HRsL.

V. Conclusion

A human rights body, trying to give effect to the principle articulated by the ICJ, has to decide first whether LOAC is applicable.⁷⁸ It then has to decide what LOAC says. In order to identify the relevant LOAC rule, it has to characterize the armed conflict as an IAC or a NIAC. If it is an IAC, the possible distinction between treaty LOAC and customary LOAC is unlikely to be of major importance. That is not the case in relation to NIACs. The human rights body needs to know whether it should only apply treaty law, in which case there is a significant difference between situations within Common Article 3 of the Geneva Conventions and those in which Additional Protocol II is applicable. On the other hand, if they are to apply both treaty and customary law, they have the unenviable task of determining the content of customary NIAC rules. The arguments as to the content of customary NIAC rules

are not for academics in ivory towers, dancing on the head of a pin; they have considerable practical importance.

It is submitted that human rights bodies are likely to see themselves as having four options:

- (1) They could regard LOAC as silent with regard to the basis for targeting in low-intensity armed conflicts, therefore applying their usual test under human rights law and limiting the application of DPH to conflicts in which Additional Protocol II was applicable.⁷⁹ This would still involve the application of a behavior test, but a slightly different one from the peacetime test.
- (2) They could apply DPH as the basis for targeting in all NIACs. This would still involve the application of a behavior test, but again a slightly different one from the peacetime test.
- (3) They could regard LOAC as silent with regard to the basis for targeting in low-intensity armed conflicts, therefore applying their usual test, but in this instance applying both DPH and a status test (member of an organized armed group exercising a continuous combat function) in situations in which Additional Protocol II was applicable.
- (4) They could use DPH as the basis for targeting in low-intensity armed conflicts and apply both DPH and a status test in situations in which Additional Protocol II was applicable.

The one thing that human rights bodies are unlikely to accept is the application of a status test in low-intensity armed conflicts.⁸⁰ That is, however, precisely what the *Interpretive Guidance* proposes with regard to members of organized armed groups exercising continuous combat functions. The *Interpretive Guidance* has therefore complicated, rather than made easier, the relationship between LOAC and HRsL. The *Interpretive Guidance* makes it clear that it is only addressing LOAC and not other bodies of rules.⁸¹ That is unhelpful since the majority of States have obligations under both LOAC and HRsL. There would appear to be little point in suggesting that States can target by reference to status in all NIACs if HRsL precludes that possibility, at least in the case of low-intensity armed conflicts.⁸² The only situation in which such a LOAC rule would conceivably be relevant would be a transnational NIAC, if and only if HRsL was not applicable extraterritorially in the particular circumstances.⁸³ The *Interpretive Guidance* should either have confined

targeting by status to situations in which Additional Protocol II was applicable or not used targeting by status at all.

Notes

1. NILS MELZER, INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009), *available at* http://www.icrc.org/eng/assets/files/other/icrc_002_0990.pdf [hereinafter INTERPRETIVE GUIDANCE].

2. Detention in transnational non-international armed conflicts (NIACs) has posed real problems of interoperability between LOAC and HRsL in Iraq and even more in Afghanistan. In large part, this is because domestic law is unlikely to address extraterritorial detention. In internal NIACs, the matter will be regulated by domestic law and HRsL. The Copenhagen Process has sought to address the issue. Thomas Winkler, Acting Legal Advisor, Danish Ministry of Foreign Affairs, Address at the 31st Round Table on Current Issues of Humanitarian Law (Sept. 5, 2008), <http://en.calameo.com/read/00000837926fb084b36c9>. *See generally* Christopher Greenwood, Report, International Law Framework for the Treatment of Persons Detained in Afghanistan by Canadian Forces ¶ 13 (2007), [http://web.ncf.ca/fk624/data/Report%20-%20Greenwood%20\(14%20Aug%2007\).pdf](http://web.ncf.ca/fk624/data/Report%20-%20Greenwood%20(14%20Aug%2007).pdf).

3. *See generally* Françoise J. Hampson, *Is Human Rights Law of Any Relevance to Military Operations in Afghanistan?*, in THE WAR IN AFGHANISTAN: A LEGAL ANALYSIS 485, 489–98 & nn.22–84 (Michael Schmitt ed., 2009) (Vol. 85, US Naval War College International Law Studies).

4. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 5 (July 8); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 106–13 (July 9) [hereinafter Wall Advisory Opinion]; Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, ¶ 216 (Dec. 19) [hereinafter Armed Activities].

5. In the cases cited in note 4 *supra*, the ICJ refers to LOAC as international humanitarian law (IHL).

6. *See generally* Nancie Prud'homme, *Lex specialis: Oversimplifying a More Complex and Multifaceted Relationship?*, 40 ISRAEL LAW REVIEW 355 (2007); Françoise Hampson, *Other areas of customary law in relation to the Study*, in PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 68 (Elizabeth Wilmschurst & Susan Breau eds., 2007) [hereinafter PERSPECTIVES ON THE ICRC STUDY].

7. Hampson, *supra* note 6, at 68–72.

8. “Special Procedures” is the general name given to the mechanisms established by the Human Rights Council to address either specific country situations or thematic issues in all parts of the world. Most of the UN Special Procedures obtain their mandates from the Human Rights Council, previously the UN Commission on Human Rights, which are then endorsed by the General Assembly. Most of the mandates address a specific issue, such as torture or extrajudicial, summary or arbitrary executions, but some deal with the human rights situation generally in a particular State. The mandates extend to all UN member States. Unlike a treaty, there is no requirement of express acceptance by a State. *See generally* Office of the United Nations High Commissioner for Human Rights, Special Procedures of the Human Rights Council, <http://www2.ohchr.org/english/bodies/chr/special/index.htm>. For an example of a relevant recent report, see Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, Human Rights Council, U.N. Doc. A/HRC/14/24/Add.6 (May 28,

2010) (by Philip Alston), *available at* <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf> [hereinafter Alston Report].

9. The European Court of Human Rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR]; the Inter-American Court of Human Rights under the American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter ACHR]; the African Court on Human and Peoples' Rights under the African Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 INTERNATIONAL LEGAL MATERIALS 58 (1982).

10. The Human Rights Committee can address individual complaints under the first Optional Protocol, Dec. 16, 1966, 999 U.N.T.S. 302 to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR], but under Article 5.4 of the Optional Protocol it adopts "views," rather than a binding legal judgment.

11. Hampson, *supra* note 3, at 498–502; Françoise J. Hampson, *The Scope of the Extra-Territorial Applicability of International Human Rights Law*, in THE DELIVERY OF HUMAN RIGHTS: ESSAYS IN HONOUR OF PROFESSOR SIR NIGEL RODLEY 157 (Geoff Gilbert, Françoise Hampson & Clara Sandoval eds., 2010); EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES (Fons Coomans & Menno T. Kamminga eds., 2004); Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AMERICAN JOURNAL OF INTERNATIONAL LAW 119 (2005); Michael J. Dennis & Andre M. Surena, *Application of the International Covenant on Civil and Political Rights in Times of Armed Conflict and Military Occupation: The Gap between Legal Theory and State Practice*, 13 EUROPEAN HUMAN RIGHTS LAW REVIEW 714 (2008); Nigel Rodley, *The Extraterritorial Reach and Applicability in Armed Conflict of the International Covenant on Civil and Political Rights: A Rejoinder to Dennis and Surena*, 14 EUROPEAN HUMAN RIGHTS LAW REVIEW 628 (2009). *See generally* NOAM LUBELL, EXTRA-TERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS (2010).

12. Wall Advisory Opinion, *supra* note 4, ¶ 112; Armed Activities, *supra* note 4, ¶ 216; U.N. Human Rights Committee, *General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004); *Loizidou v. Turkey*, 1996-VI Eur. Ct. H.R. 2216.

13. U.N. Human Rights Committee, Communication No. 52/1979 *López Burgos v. Uruguay*, Views of the Human Rights Committee, U.N. Doc. CCPR/C/13/D/52/1979 (July 29, 1981); *Ocalan v. Turkey*, App. No. 46221/99 (Eur. Ct. H.R. May 12, 2005) (Grand Chamber).

14. *Bankovic and Others v. Belgium*, 2001-XII Eur. Ct. H.R. 333, *reprinted in* 123 INTERNATIONAL LAW REPORTS 94 (2001).

15. ICCPR, *supra* note 10, art. 2.1 ("Each State Party . . . undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction"); ECHR, *supra* note 9, art. 1 ("The High Contracting Parties shall secure to everyone within their jurisdiction"); ACHR, *supra* note 9, art. 1 ("The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms"). There is no jurisdictional clause in the African Charter, *supra* note 9.

16. This does not mean that extraterritoriality will be of no significance to such bodies, since it may have an impact in relation to State responsibility for positive obligations outside national territory.

17. The English courts are required, under the Human Rights Act 2000, to take account of the caselaw of the ECtHRs. In *The Queen on the Application of "B" & Others v. Secretary of State for the Foreign and Commonwealth Office* [2004] EWCA (Civ) 1344 [59] (unreported, Oct. 18, 2004), a case that concerned the actions of consular officials in Australia, the Court of Appeal had

difficulty in reconciling the decisions of the ECtHRs in *Bankovic*, *supra* note 14, and *Ocalan*, *supra* note 13. In *Al-Skeini & Others v. Secretary of State for Defence* [2004] EWHC (Admin) 2911 [222], the High Court had difficulty in reconciling the decisions of the ECtHRs in *Bankovic* and *Issa & Others v. Turkey*, App. No. 31821/96, Eur. Ct. H.R., Chamber, Admissibility Decision (May 30, 2000); *Issa and Others v. Turkey*, App. No. 31821/96, 41 Eur. Ct. H.R. Rep. 567 (2004).

18. *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 68–70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶¶ 635–36 (Sept. 2, 1998).

19. The destruction, capture or neutralization of an object has to offer a definite military advantage in order for the thing to be a military objective as defined in Article 52.2 of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]. Had the roads and bridges been so used, they would have become military objectives. In other words, the advantage of using the definition of “military objective” to determine the geographical scope of applicability of LOAC is that it depends on the facts and the conduct of the parties, rather than a potentially arbitrary geographical yardstick.

20. The treaty rules appear to have been designed for situations of internal NIAC, that is to say, an armed conflict within a State either between that State and one or more organized armed groups or between such groups themselves within the territory of a State. The treaty language means that Common Article 3 of the Geneva Conventions of 1949 is capable of applying to an armed conflict in State B between State A and an organized armed group based in and fighting from State B. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]. Additional Protocol II of 1977 cannot be applicable in such a situation since it requires the State party to an armed conflict to be the same State as the one in whose territory the conflict is fought. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 1, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

21. “Certainly, some of the provisions are clearly bound up with the hostilities and the geographical scope of those provisions should be so limited.” *Tadic*, *supra*, note 18, ¶ 68.

22. E.g., the United Kingdom in relation to Northern Ireland and Turkey in relation to the situation in southeast Turkey in the late 1980s and early 1990s.

23. This raises the question of how to establish customary law in NIACs. Are domestic judicial decisions that may not be based on LOAC but purely on domestic law relevant as a source? When trying to establish custom, is it appropriate to look at a situation in which LOAC appears to be applicable and then to examine any evidence of the existence of rules, whatever their source or nature, or is the only relevant information evidence of international rules of a LOAC type thought to be applicable? See I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW xxv–xlv (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) & *infra* note 40.

24. With the possible addition of HRsL and other areas of international law insofar as they are unaffected by the existence of the armed conflict, see the ongoing work of the International Law Commission on the Effects of Armed Conflicts on Treaties, http://untreaty.un.org/ilc/guide/1_10.htm (last visited Jan. 17, 2011).

25. It is likely to be more relevant to measures taken domestically on account of the IAC, e.g., evacuation or detention of enemy aliens.

26. The ECHR, *supra* note 9, art. 15; ACHR, *supra* note 9, art. 27, and ICCPR, *supra* note 10, art. 4, expressly envisage the possibility that there may be an emergency within a State of such a character as to require the State to take exceptional measures and to prevent it from applying ordinary measures in the usual way. The treaties provide that, in such a situation, the State may modify the scope of certain of its human rights obligations, subject to procedural requirements with regard to notification. The process is known as derogation. Certain rights are non-derogable (e.g., the prohibition of arbitrary killings under the ICCPR and the ACHR, and of torture under all three treaties; see further *infra*). Even potentially derogable rights may have a non-derogable core. For example, a derogation to the usual requirements with regard to detention may justify a longer than usual period before a detainee is brought before a judicial officer or administrative detention but it will never justify enforced disappearances. See generally U.N. Human Rights Committee, *General Comment No. 29*, U.N. Doc. CCPR/C/21/Rev.1/Add.11 on Art. 4 ICCPR, ¶ 16 (2001); Hampson, *supra* note 3, 492–94.

27. *Lawless v. Ireland*, 3 Eur. Ct. H.R. (ser. A) ¶¶ 28–29 (1961).

28. *Brogan & Others v. United Kingdom*, App. Nos. 11209/84, 11234/84, 11266/84 & 11386/85, 11 Eur. H.R. Rep. 117 (1988) (Eur. Ct. H.R.); *Brannigan & McBride v. United Kingdom*, App. Nos. 14553/89 & 14554/89, 258 Eur. Ct. H.R. (ser. A) 29 (1993); *Aksoy v. Turkey*, 1996-VI Eur. Ct. H.R. 2260.

29. For example, if in an IAC a commander gave the order that armed forces could only open fire in self-defense and a member of the armed forces deliberately killed a combatant who did not pose a threat to him, the soldier has not acted in violation of LOAC but could be punished for disobeying a lawful order.

30. That is usually the case under domestic law. Under most HRsL, the test is whether a killing is arbitrary. What is arbitrary in peacetime is not the same as that which is arbitrary in time of conflict. The caselaw of human rights bodies suggests that peacetime killings are analyzed in terms of a law and order paradigm. Article 2 of the ECHR is different and unique in that it sets out the only grounds on which a State may resort to the use of potentially lethal force. Those grounds are based on a law and order paradigm. See further note 71 *infra* and accompanying text.

31. An obvious exception is the absolute prohibition of intentional attacks against civilians and the civilian population. The distinction between Hague-law prohibitions and Hague-law permissions will be considered further below.

32. E.g., “for reasons of imperative military necessity” and “unless circumstances do not permit.”

33. An exception is Geneva Convention IV, *supra* note 20, Part 2, which addresses the “general protection of populations against certain consequences of war.”

34. E.g., evacuating and caring for the wounded and sick, and using members of the armed forces to run prisoner of war camps.

35. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137, *reprinted in* 19 INTERNATIONAL LEGAL MATERIALS 1523 (1980). Amended Article 1 made the Convention as a whole and therefore all its protocols applicable in both IACs and NIACs. Amendment to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Doc. No. CCW/CONF/II/2 (Dec. 21, 2001). A subsequent Protocol on Explosive Remnants of War (Protocol V), Nov. 27, 2003, U.N. Doc. CCW/MSP/2003/2, was therefore applicable in both IACs and NIACs from the start. That change had already

been made with regard to the Protocol on Blinding Laser Weapons (Protocol IV), Oct. 13, 1995, U.N. Doc. CCW/CONF.I/7 (Oct. 12, 1995) as a result of the 2001 amendment and the Amended Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Amended Protocol II), May 3, 1996, S. Treaty Doc. No. 105-1 (1997) was applicable in both IACs and NIACs from the start as a result of Article 1.2 of the Protocol.

The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 2056 U.N.T.S. 211, *reprinted in* 36 INTERNATIONAL LEGAL MATERIALS 1507 (1997) and the Convention on Cluster Munitions, Dec. 3, 2008, 48 INTERNATIONAL LEGAL MATERIALS 357 (2008) prohibit the use of the weapons defined in those treaties in all circumstances, therefore in both IACs and NIACs.

The significance of the distinction between Hague-law prohibitions and Hague-law permissive rules will be considered further.

36. There is a real difficulty in making the weapons rules applicable in both situations, but it is not attributable to the distinction between prohibitions and permissions in Hague law, rather to the paradigm confusion between law and order/law enforcement and an armed conflict paradigm. Certain weapons that are traditionally used and have an important role to play in law enforcement are prohibited in IACs, most notably expanding bullets and riot control agents, such as tear gas. The increasing complexity of modern conflict, sometimes characterized as “three-block warfare,” results in different rules being applicable in different situations at the same time. The difficulties to which that gives rise in practice are likely to be exacerbated if the clear distinction between what is permitted and prohibited in different situations and paradigms becomes blurred. An example of such confusion is Resolution RC/Res.5 adopted at the Review Conference of the Rome Statute on June 8, 2010, which adds to the list of war crimes in NIACs “(xv) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions.” Resolutions and Declarations adopted by the Review Conference, http://212.159.242.181/iccdocs/asp_docs/ASP9/OR/RC-11-Part.II-ENG.pdf (last visited Jan. 17, 2011).

The difficulties would be reduced if the changes were confined to situations in which Additional Protocol II is applicable, since an armed conflict paradigm is more clearly applicable in such situations than those in which the level of violence comes within Common Article 3 but not Additional Protocol II. It should be noted that, in some circumstances, Additional Protocol II will not be applicable for a different reason. If State A is engaged in an armed conflict in State B against a non-State armed group based in State B, Additional Protocol II is not applicable since the State in whose territory the conflict is being fought is not a State party to the conflict. Nevertheless, the level of violence and the degree of organization and control of the non-State actor might be sufficient to satisfy the high threshold of Additional Protocol II were it not for this barrier to its applicability.

37. CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 23.

38. Knut Dörmann, *War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes*, in 7 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 341, 345 (Armin von Bogdandy & Rüdiger Wolfrum eds., 2003). The one exception was anything addressing the recruitment or use of child soldiers, which was an example of progressive development. It appears to be universally acceptable as a rule, if not in the observance.

39. Statute of the International Criminal Court art. 8.2(d) & (f), July 17, 1998, 2187 U.N.T.S. 90. Interestingly the definition of “an armed conflict not of an international character” differs slightly as between the list of criminalized violations of Common Article 3 and other criminalized violations. In the case of the former, the list of crimes “does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other

acts of a similar nature.” This reflects Article 1.2 of Additional Protocol II of 1977. In the case of war crimes in NIACs not based on Common Article 3, the definition in Article 8.2(f) starts in the same way but continues, “It [paragraph 2(e)] applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.” The reference to “protracted” is not to be found in Common Article 3 itself but is one of the elements thought necessary to constitute an armed conflict by the ICTY, as reflected by the judgment in the *Tadic* case, *supra* note 18. It is not clear whether this is simply intended to serve as a definition of a Common Article 3 NIAC (in which case why was the same text not included in subparagraph d?) or whether it is intended to create a new threshold in the case of war crimes not based on Common Article 3. If the threshold is different, it would explain why it is not used in subparagraph d. It is not clear whether the threshold is higher or merely different.

40. John B. Bellinger III & William J. Haynes II, *A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law*, 89 INTERNATIONAL REVIEW OF THE RED CROSS 443 (2007). See generally PERSPECTIVES ON THE ICRC STUDY, *supra* note 6. The study has been challenged on a variety of grounds. Some have questioned the nature of some of the materials used as evidence of State practice. Others have questioned the sufficiency of the evidence used to establish the existence of a rule. Yet others accept the manner in which a rule is formulated but challenge the accuracy of the commentary.

41. While the focus in this text is on the responsibilities of States, since only States (and arguably quasi-State entities) have legal obligations under HRsL, it should not be forgotten that the applicability of customary LOAC rules of a Hague-law type across the threshold merely of Common Article 3 would have implications for non-State organized armed groups.

42. INTERPRETIVE GUIDANCE, *supra* note 1. See further discussion *infra* pp. 198–202, The Literal Meaning of “Direct Participation” in Hostilities and the *Interpretive Guidance*.

43. See REPORT OF THE BLOODY SUNDAY INQUIRY (2010), available at <http://report.bloody-sunday-inquiry.org/>. The author has chosen to call the city of Northern Ireland where the events of Bloody Sunday occurred, known as both Derry and Londonderry, (London)Derry, so as to accommodate both the Catholic/Nationalist and Protestant/Unionist views of the name.

44. The Foreign and Commonwealth Office of the United Kingdom denied that the situation in Northern Ireland ever crossed the threshold of Common Article 3. Many members of the Army Legal Services appear to be of the view that at certain times and in certain places the situation did cross that threshold.

45. Proposed as the test in all NIACs in the *Interpretive Guidance*. See INTERPRETIVE GUIDANCE, *supra* note 1, at 36.

46. At the time, as a matter of domestic law, the armed forces only had the same authority as a policeman to open fire and that was based on a law and order paradigm.

47. The term “combatant” is used in Additional Protocol I (e.g., Articles 43 and 44) and replaces the use of “belligerent” in Regulations Respecting the Laws and Customs of War on Land, annexed to Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2227 [hereinafter Hague Regulations]. Article 50 of Additional Protocol I effectively defines civilians as persons who are not combatants. The terms are therefore mutually exclusive and no one can fall in between the two. Combatants include not only members of the regular armed forces, but also members of a militia who satisfy the requirements of Article 43 of Additional Protocol I or Article 1 of the Hague Regulations, *supra*, and members of a *levée en masse* under Article 2 of the same treaty.

48. Additional Protocol I, *supra* note 19, art. 43.2. A combatant cannot be prosecuted for the fact of fighting or for killing opposing combatants.

49. INTERPRETIVE GUIDANCE, *supra* note 1, at 27.

50. Additional Protocol I, *supra* note 20, art. 51.3; Additional Protocol II, *supra* note 19, art. 13.3.

51. INTERPRETIVE GUIDANCE, *supra* note 1, at 11.

52. The *Interpretive Guidance* is clear that it is not intended to and does not effect any change in the law. See, e.g., *id.* at 19.

53. For detailed scrutiny of the *Interpretive Guidance*, see Forum, *The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, 42 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 637 (2010). The whole issue is devoted to the *Guidance*. This article criticizes it from a standpoint not addressed in other writings, which tend to focus on an exclusively LOAC perspective.

54. See *supra* note 47.

55. INTERPRETIVE GUIDANCE, *supra* note 1, at 27.

56. *Id.* at 23.

57. *Id.* at 24.

58. *Id.* at 27–28.

59. *Id.* at 28.

60. *Id.* at 29.

61. *Id.* at 32–33.

62. Article 50.1 of Additional Protocol I, in effect, defines a civilian as any person who is not a combatant.

63. See comment in *supra* note 36 on the circumstances in which only Common Article 3 will be applicable, notwithstanding the existence of a level and nature of violence as to satisfy the threshold of Additional Protocol II.

64. INTERPRETIVE GUIDANCE, *supra* note 1, at 82.

65. *Id.* at 81.

66. See generally W. Hays Parks, *Part IX of the ICRC “Direct Participation in Hostilities” Study: No Mandate, No Expertise and Legally Incorrect*, 42 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 769, 801–2 (2010).

67. In certain circumstances, it may make operational sense to say that armed forces are free to target by reference to status but, if an opportunity arises to detain, they should do so, whether in the hope of obtaining intelligence or to assist in the “battle for hearts and minds.” That is not the same as combining the two elements. The default position is the targeting test. Detention is merely an alternative option. See also Parks, *id.* at 809.

68. Alston Report, *supra* note 8. Since the mandate of Professor Alston, the Special Rapporteur preparing the report, contains no requirement that the victim be within the jurisdiction of the State, his comments on the extraterritorial applicability of the obligation to protect the right to life are not of direct assistance in determining the scope of applicability in the case of treaties containing such a requirement. There is no reason to have any such reservation in relation to the meaning to be ascribed to “arbitrary.” The mandate is generally interpreted as covering similar ground to Article 3 of the Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948), and Article 6 of the ICCPR, *supra* note 10. In other words, it is not limited to executions but extends to killings generally. See Office of the United Nations High Commissioner for Human Rights, *International Standards*, <http://www2.ohchr.org/english/issues/executions/standards.htm> (last visited Jan. 17, 2011).

69. See, e.g., *Husband of Maria Fanny Suarez de Guerrero v. Colombia*, Human Rights Comm., 37th Sess., No. R.11/45, P 12.2, U.N. Doc. Supp. No. 40 (A/37/40) (1982); *McCann v. United Kingdom*, App. No. 18984/91, 324 Eur. Ct. H.R. (ser. A) ¶¶ 147–50 (1995).

Those concerned with the relationship between LOAC and HRsL in the context of targeted killings have paid considerable attention to “the targeted killings case.” Public Committee against Torture in Israel v. Government of Israel, HCJ 769/02, Judgment (Dec. 13, 2006), 46 INTERNATIONAL LEGAL MATERIALS 373 (2007), available at http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf.

It should be noted that the Israeli court went out of its way to stress the very particular context in which the case arose, that is, occupied territory adjacent to the territory of the occupying power. See generally William J. Fenrick, *The Targeted Killings Judgment and the Scope of Direct Participation in Hostilities*, 5 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 332–38 (2007).

70. Potentially, that could include behavior which constituted direct participation in hostilities but which did not represent a threat to others at the time.

71. Article 2 of the ECHR provides:

1. Everyone’s right to life shall be protected by law. . . .
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

72. McCann v. United Kingdom, *supra* note 69, ¶ 149.

73. *Id.*, ¶¶ 192–94.

74. Ergi v. Turkey, App. No. 23818/94, 32 Eur. H.R. Rep. 388 (1998).

75. Gulec v. Turkey, 28 Eur. H.R. Rep. 121, ¶ 71 (1998).

76. Noam Lubell, *Challenges in Applying Human Rights Law to Armed Conflict*, 87 INTERNATIONAL REVIEW OF THE RED CROSS 737, 745–46 (2005).

77. ECHR, *supra* note 9, art. 15.2.

78. Françoise J. Hampson, *The Relationship Between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body*, 90 INTERNATIONAL REVIEW OF THE RED CROSS 549 (2008).

79. When the conflict is of the requisite intensity for Additional Protocol II to be applicable, but it is not applicable because the conflict occurs in the territory of a State not a party to the conflict, it should be treated as an Additional Protocol II conflict for these purposes. It is beyond the scope of this article to consider whether Article 1.1 of Additional Protocol II should be amended to replace “its armed forces” by “the armed forces of a High Contracting Party.”

80. See generally David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUROPEAN JOURNAL OF INTERNATIONAL LAW 171 (2005).

81. INTERPRETIVE GUIDANCE, *supra* note 1, at 11.

82. “Low-intensity conflict” is used so as to exclude situations in which only Common Article 3 to the Geneva Conventions is applicable, not on account of the limited intensity of the violence, but because the State in whose territory the conflict is fought is not a party to the conflict. See *supra* notes 36 & 79.

83. The reference here is to a conflict in the territory of State B between the armed forces of State A and a non-State actor in State B. Where State A is assisting State B in an armed conflict against a non-State actor, State A is acting extraterritorially but the conflict is not transnational. If the consent of State B is the basis for the presence of State A, State B may have the obligation, under HRsL, to ensure that any State assisting it should respect State B’s human rights obligations. No issue would arise for State B as to the scope of the extraterritorial applicability of HRsL.

PART VI

**THE CHANGING CHARACTER OF WEAPON
SYSTEMS: UNMANNED SYSTEMS/UNMANNED
VEHICLES**

IX

Use of Unmanned Systems to Combat Terrorism

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I. Introduction

As the number of unmanned systems to support military operations has proliferated over the past decade, so too have the legal issues associated with their use in conventional warfare and the “war on terrorism.” Between 2000 and 2008, the number of unmanned aerial systems (UAS) in the US Department of Defense (DoD) inventory jumped from under fifty to over six thousand.¹ By March 2010, the number had increased to over seven thousand.² In fiscal year 2009, UAS conducted over 450,000 flight hours; the number of hours in 2010 was expected to exceed 550,000.³ To support this increasing reliance on unmanned systems, the Air Force is expanding the number of UAS pilots and air operations staffers from 450 to 1,100 by 2012.⁴ In 2009, the Air Force trained more UAS pilots than fighter pilots.⁵

Today, unmanned systems are being used across the entire spectrum of operations, from their traditional role of intelligence, surveillance and reconnaissance (ISR) to an emerging role of offensive strike operations. UAS have clearly become the weapon of choice to target terrorists and other militants in isolated locations within Pakistan and Yemen. In 2007, for example, there were only 5 UAS attacks in Pakistan.⁶ The number of aerial attacks increased to 36 in 2008, and during the first year of the Obama administration the number jumped to 53.⁷ During the first

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four months of 2010, UAS have conducted 60 attacks in Pakistan.⁸ If the current pace continues, the number of UAS attacks could well exceed 150 in 2010.

The importance of the relationship between the use of unmanned systems and the law is not lost on our military and civilian leaders. At a session on unmanned naval technologies at the Brookings Institution in November 2009, the Chief of Naval Operations, Admiral Gary Roughead, acknowledged that “as unmanned systems become ubiquitous on the modern battlefield in everything from targeting to disrupting the flow of enemy information . . . , there are going to be legal issues that come up and issues related to the law of war.”⁹ Four months later, the State Department Legal Adviser, Harold Koh, defended the Obama administration’s use of UAS to engage terrorist targets in Pakistan and elsewhere, indicating that “U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war.”¹⁰

Not everyone agrees, however, that the use of unmanned systems to attack terrorist targets outside traditional “combat zones,” like Afghanistan and Iraq, is consistent with international and domestic law. Some of the criticisms that will be examined in this paper include:

- The United States is not engaged in an armed conflict with al-Qaeda or any other militant group. Terrorist attacks are criminal acts that must be addressed with law enforcement measures, not armed attacks that give rise to the use of military force in self-defense. The use of force in this context is governed by international human rights law (IHRL), not international humanitarian law (IHL). Because armed drones are warfighting, not law enforcement, tools, they may not be used to strike terrorist targets outside the combat zone.
- Targeting individual terrorist leaders constitutes an unlawful extrajudicial killing in violation of IHRL, as well as the ban on assassination under Executive Order (E.O.) 12333.
- Conducting UAS strikes against terrorist targets within the territory of another nation without the consent of that nation violates Article 2(4) of the UN Charter, which restricts nations from using force against the territorial integrity or political independence of any State.
- Even if the right of self-defense applies, the use of UAS to attack terrorist targets outside Afghanistan and Iraq violates the IHL principles of military necessity, proportionality and distinction.
- If the United States is engaged in an armed conflict, civilian UAS operators (e.g., Central Intelligence Agency (CIA) operatives) are unlawful combatants and may not participate in hostilities. Only lawful combatants have a right to use force during an armed conflict.

- UAS strikes may only be conducted against civilians who have taken a direct part in hostilities. Although acts of terrorism may cause harm, most do not meet the criteria for direct participation in hostilities (DPH). State responses to these acts must conform to the lethal force standards applicable to self-defense and law enforcement.
- The use of advanced weapons systems in lethal operations against terrorists is illegal under international law.

II. Armed Attack or Threat of Attack by Non-State Actors and the Right of Self-Defense

Opponents to the use of drones outside of Afghanistan and Iraq argue that the "war on terrorism" is a myth because al-Qaeda's actions and US responses thereto "have been too sporadic and low-intensity to qualify as armed conflict."¹¹ They cite *Prosecutor v. Tadić* and Additional Protocol II (AP II) to support their position. In *Tadić*, the International Criminal Tribunal for the former Yugoslavia determined that an "armed conflict exists wherever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state."¹² AP II similarly provides that armed conflicts do not include "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature."¹³ These opponents further argue that an armed military response to a terrorist attack will almost never meet the requirements for the lawful exercise of self-defense, because "terrorist attacks are generally treated as criminal acts . . . , not armed attacks that can give rise to the right of self-defense."¹⁴ They additionally argue that the use of military force "long after the terror act . . . loses its defensive character and becomes unlawful reprisal."¹⁵

These arguments are incorrect as a matter of law and are clearly not supported by State practice. Foremost, they ignore the fact that more innocent victims have died at the hands of terrorists since 9/11 than on the battlefields of Afghanistan and Iraq combined. These numbers do not include the thousands of innocent civilians killed by al-Qaeda, the Taliban and other militant groups in Afghanistan and Iraq since 2002. These figures also do not take into account the fact that the number of deaths and injuries would have been much higher had several planned terrorist attacks been successful. To argue that al-Qaeda's actions have been too sporadic and low-intensity to qualify as an armed conflict is disingenuous, at best. Al-Qaeda operatives have attacked US embassies and consulates, US naval vessels, US military bases, the Pentagon and the US financial center in New York. With operations in over sixty countries, al-Qaeda has trained, equipped and supported

a potent armed force that continues to plan and execute attacks against the United States and its interests worldwide on a scale that requires a proportionate military response. Despite coalition successes in Iraq, Afghanistan and around the world, al-Qaeda continues to pose a significant and imminent threat to the United States and its allies. In short, the armed conflict against the organization and its affiliates is far from over.

The opponents' arguments likewise disregard the fact that the law regarding armed attacks by non-State actors and the application of IHL (i.e., the law of armed conflict (LOAC)) to these armed groups have evolved dramatically since the mid-1990s, particularly after 9/11. Based on actions taken by the UN Security Council, the North Atlantic Treaty Organization (NATO) and the Organization of American States (OAS) after the 9/11 terrorist attacks, it is now well recognized that non-State actors can engage in an armed attack that gives rise to the right of national and collective self-defense.

A. Armed Attacks by Non-State Actors

On September 11, 2001, terrorists associated with al-Qaeda crashed two commercial jets into the twin towers of the World Trade Center (WTC), another jet into the Pentagon and a fourth in a field in rural Pennsylvania. Nearly three thousand people, mostly civilians, were killed and thousands of others were injured.

Immediately following these brutal and unprovoked attacks, the Security Council determined that al-Qaeda, a non-State actor, had conducted an armed attack against the United States, giving rise to the right of individual and collective self-defense under Article 51 of the Charter.¹⁶ Security Council Resolution 1368 (2001) further determined that the 9/11 attack, "like any act of international terrorism," was a "threat to international peace and security" and expressed a readiness "to take all necessary steps to respond to the terrorist attacks of . . . [9/11], and to combat all forms of terrorism."¹⁷

NATO soon followed suit, invoking Article 5 of the Washington Treaty for the first time in its history. Article 5 provides that if a NATO ally is the victim of "an *armed attack*," each and every member of the alliance will consider that act as an armed attack against all members and will take actions they deem necessary in collective self-defense to assist the ally that has been attacked (emphasis added).¹⁸ A few weeks later, recalling the inherent right of individual and collective self-defense, the OAS adopted a resolution on September 21 acknowledging that the 9/11 attack against the United States was an attack "against all American states and that in accordance with [Article 3 of] . . . the Inter-American Treaty of Reciprocal Assistance (Rio Treaty) . . . , all States Parties . . . shall provide effective reciprocal assistance to address such attacks and the threat of any similar attacks

against any American state”¹⁹ The resolution further decided that “the States Parties shall render additional assistance and support to the United States and to each other . . . to address the September 11 attacks, and also to *prevent future terrorist acts*”²⁰ (emphasis added).

Domestically, the US Congress responded by adopting a joint resolution—Authorization to Use Military Force (AUMF)—that authorized the President “to use *all necessary and appropriate force* against those nations, organizations, or persons he determines planned, authorized, committed, or aided the *terrorist attacks* that occurred on September 11, 2001, or harbored such organizations or persons, in order to *prevent any future acts* of international terrorism against the United States by such nations, organizations or persons”²¹ (emphases added). The US Supreme Court subsequently “recognized the AUMF as the functional equivalent of a declaration of war” in the *Hamdi* and *Hamdan* decisions and the 2010 National Security Strategy continues to reflect the view that the United States is “at war with . . . al-Qa’ida, and its terrorist affiliates who support efforts to attack the United States, our allies, and partners.”²²

Based on these international and domestic authorities, the United States commenced military operations in self-defense against al-Qaeda and the Taliban in Afghanistan on October 7, 2001. Of note, military operations against non-State actors are consistent with prior US practice. Throughout its history, the United States has engaged in a number of armed conflicts with groups that it has not recognized as sovereign nations in such conflicts as the US Civil War, Indian wars, Philippine Insurrection and Vietnam War (Viet Cong).²³ The question today is whether these historical precedents and the 2001 authorities remain viable in 2010, and whether they (along with the inherent right of self-defense) can be extended to apply to terrorist forces that continue to plan and conduct acts of aggression against the United States and its allies outside the borders of Afghanistan and Iraq.

Clearly, the answer to both of these questions is yes. Following 9/11, the Security Council, NATO and OAS all determined that the United States had been “attacked” by al-Qaeda, giving rise to the right of national and collective self-defense. These determinations are consistent with the plain language of Article 51 of the UN Charter, which simply refers to armed attacks against a member State (i.e., “nothing . . . shall impair the inherent right of individual or collective self-defense if an *armed attack occurs* against a Member of the United Nations” (emphasis added)). The Charter does not require that the attack be conducted by a nation-State. Moreover, none of these organizations placed temporal or geographic restrictions on the use of force in self-defense. On the contrary, the opposite is true. Resolution 1368 specifically decided that “*any act of international terrorism* [is] . . . a threat to international peace and security” (emphasis added). Moreover, the

resolution expressed a readiness “to take all necessary steps . . . to combat *all forms of terrorism*,” not just the 9/11 attack (emphasis added). The OAS resolution similarly provided that the States parties would provide assistance and support to the United States to address the 9/11 attacks, as well as “the *threat of any similar attacks* against any American state . . . to *prevent future terrorist acts*” (emphases added). And while NATO simply decided that all member States should take the actions they deemed necessary to assist the United States following the 9/11 attacks, it did not limit that assistance to a particular country or military operation. Likewise, although the AUMF adopted by Congress focuses on the nations, organizations or persons that planned, authorized, committed or aided the 9/11 attacks (or harbored such organizations or persons), the law does not place any temporal or geographic restrictions on the use of force. It simply provides that the President can use all necessary and appropriate force against those responsible for the 9/11 attacks “in order to *prevent any future acts* of international terrorism against the United States by such nations, organizations or persons” (emphasis added).

Despite the use-of-force measures authorized by these international and regional organizations, as well as the US Congress, opponents to the use of drones to attack terrorists outside of Afghanistan and Iraq nevertheless argue that these authorities are dated and that use of force based on continued reliance on these authorities has lost its defensive character and amounts to unlawful reprisals. Assuming for the sake of argument that the opponents are correct in saying that the United States is not at war with al-Qaeda and that the 2001 authorities have somehow lapsed, that does not end the debate. The inherent right of self-defense still provides an adequate legal basis to use lethal force against terrorist targets in Pakistan and elsewhere that demonstrate a continuing and imminent threat of armed attack against the United States and its interests.

B. The Inherent Right of Self-Defense

Customary international law, as reflected in Article 51 of the UN Charter, recognizes that all nations enjoy an inherent right of individual and collective self-defense. Included within this right is the right of anticipatory self-defense—the right of a nation to protect itself from an imminent attack where peaceful means are not reasonably available to prevent the attack.²⁴ Clearly, it would be inconsistent with the purposes of the Charter if a nation was required to absorb a first strike, e.g., another 9/11 or a weapon of mass destruction attack, before taking necessary and proportionate military measures to prevent an imminent attack by an armed aggressor. In this context, “imminent” does not necessarily mean immediate or instantaneous. As indicated in the 2006 US National Security Strategy:

[T]he first duty of the United States Government remains what it always has been: to protect the American people and American interests. It is an enduring American principle that this duty obligates the government to anticipate and counter threats, using all elements of national power, before the threats can do grave damage. The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. . . .

To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively in exercising our inherent right of self-defense. The United States will not resort to force in all cases to preempt emerging threats. Our preference is that nonmilitary actions succeed. And no country should ever use preemption as a pretext for aggression.²⁵

The determination of whether an attack is imminent is therefore based on an assessment of all facts and circumstances known at the time—real-time intelligence, heightened political tensions, previous and current threats by the aggressor, pattern of aggression/attacks, stated intentions of the aggressor, etc.

The pivotal question today is whether the ongoing activities of al-Qaeda and its supporters continue to pose an imminent threat to the United States and its allies that would justify the use of armed force in self-defense to preempt future attacks against US interests at home and abroad. If one examines past and current acts of aggression committed by al-Qaeda and its affiliates against the United States and its allies, the answer to that question is clearly yes.

Since the first attack on the WTC in 1993, there have been over seventy major terrorist attacks against the United States and its allies that have resulted in the deaths of over five thousand people, most of whom were innocent civilians.²⁶ These deaths exceed the total number of US soldiers killed in action in Afghanistan and Iraq since the beginnings of Operation Enduring Freedom and Operation Iraqi Freedom.²⁷ Over sixty of these incidents have occurred since 9/11, resulting in over sixteen hundred deaths and thousands of others injured. These numbers would be much higher if you count the thousands of innocent civilians that have been killed by al-Qaeda and the Taliban in Iraq and Afghanistan or had several planned attacks—such as the December 1999 plot to bomb the Los Angeles airport, the December 2001 failed “shoe bomber” attack, the foiled attack on a British airliner in Saudi Arabia in August 2003, the August 2006 plot to blow up ten planes bound for the United States, the June 2007 failed car bombings in London, the December 2009 failed “underwear bomber” attack and the May 2010 failed bombing in Times Square—been successful.

It is clear from these incidents that al-Qaeda continues to pose an imminent threat to the United States and its allies and continues to threaten large-scale attacks against the United States and US interests. For instance, in November 2008, a former senior Yemeni al-Qaeda operative told the London-based *Al-Quds Al-Arabi* newspaper that Osama bin Laden was planning an attack against the United States that would outdo 9/11 and that al-Qaeda was reinforcing “training camps around the world that will lead the next wave of action against the West.”²⁸ In June 2009, Al-Jazeera television broadcast a message from bin Laden that threatened Americans with revenge for supporting Pakistan’s military offensive to expel the Taliban from Swat Valley.²⁹ Six months later, a Nigerian man (Umar Farouk Abdulmutallab, the “underwear bomber”) with links to al-Qaeda attempted to ignite an explosive device on board a Northwest Airlines flight with 278 passengers on board as the plane prepared to land in Detroit on Christmas day.³⁰ Fortunately, the device failed to ignite, but bin Laden nevertheless claimed responsibility for the attempted bombing.³¹ In January 2010, the US embassy in Yemen was closed in response to ongoing threats by al-Qaeda.³² An attack on the embassy in 2008 had killed nineteen, including an eighteen-year-old American woman.³³ In March 2010, Al-Jazeera aired a tape in which bin Laden threatened to kill any American captured by al-Qaeda if the United States executed Khalid Sheikh Mohammed, the alleged mastermind of the 9/11 attack.³⁴

In early May 2010, a naturalized US citizen from Pakistan, Faisal Shahzad, unsuccessfully attempted to ignite a car bomb that contained gasoline, propane, fertilizer and fireworks in Times Square.³⁵ According to Attorney General Holder, it was “clear that this was a terrorist plot aimed at murdering Americans in one of the busiest places in the country.”³⁶ Shahzad was arrested by the Federal Bureau of Investigation on May 4. During his interrogation, he admitted his role in the attempted attack and that he had received explosives training in Pakistan during a then-recent visit.³⁷ On June 21, Shahzad pled guilty to ten criminal counts, including the attempted use of a weapon of mass destruction, and indicated that until the United States “stops the occupation of Muslim lands and stops killing the Muslims . . . we will be attacking [the] U.S.”³⁸ The Pakistani Taliban immediately took credit for the attack and there is now evidence that the group was intimately involved in the failed attack.³⁹ Several additional suspects have been arrested in Pakistan, including an executive (Salman Ashraf Khan) of a catering company that routinely organizes events for the US embassy, and three Pakistanis were taken into custody in the United States for their suspected roles in the attack.⁴⁰

In mid-May, Indonesian police foiled an al-Qaeda plot to assassinate President Susilo Bambang Yudhoyono and other senior government officials at the upcoming Independence Day (August 17) celebrations in Jakarta. The plan also included

attacking hotels and killing foreigners—in particular, Americans. In addition to arresting a large number of suspected militants at an al-Qaeda training camp in Aceh, the Indonesian police also seized a large number of assault rifles, thousands of rounds of ammunition and jihadist literature.⁴¹

And on May 17, 2010, Iraqi security forces announced they had arrested a known al-Qaeda militant, Abdullah Azam Saleh al-Qahtani, who was planning an attack at the World Cup in South Africa and on June 26, 2010, a Pakistani suspect in the 2008 Mumbai attacks was arrested in Zimbabwe when he tried to cross into South Africa with a false Kenyan passport.⁴² Finally, on July 11, 2010, the Somali insurgent group al-Shabab, which has ties to al-Qaeda, claimed responsibility for a coordinated attack that killed more than seventy people, including a number of foreigners (one was an American), that were watching the final match of the World Cup on outdoor screens in Kampala, Uganda.⁴³

In discussing the ongoing terrorist threat against the United States and its allies, Director of National Intelligence Michael McConnell told Congress in November 2008 that al-Qaeda was “improving the last key aspect of its ability to attack the US: the identification, training and positioning of operatives [i.e., Western recruits, including American citizens] for an attack on the homeland.”⁴⁴ According to a study by the New America Foundation, “between 100 and 150 Westerners are believed to have traveled to the [Federally Administered Tribal Areas] FATA in 2009” to train with Taliban militants.⁴⁵ Arguably, these new recruits will be able to move around the United States and Europe more easily and be more difficult to detect than traditional foreign operatives.

There is also growing evidence that al-Qaeda’s anti-American/anti-Western ideology has been adopted by a number of Islamist extremist groups in Europe and North America.⁴⁶ A Pennsylvania woman (Colleen LaRose, a.k.a. Jihad Jane), for example, was indicted in March 2010 for “conspiracy to provide material support to terrorists and kill a person in a foreign country.”⁴⁷ LaRose conspired with five unnamed coconspirators to, *inter alia*, recruit “men online to wage violent jihad in South Asia and Europe . . . [and] women online who had passports and the ability to travel to and around Europe in support of violent jihad.”⁴⁸ According to the indictment, LaRose believed that “her physical appearance would allow her to blend in with many people.”⁴⁹ A second US citizen, Jamie Paulin Ramirez, was indicted in April 2010 for her involvement in the conspiracy with Jihad Jane.⁵⁰ Irish police have since arrested seven additional individuals involved in the conspiracy.⁵¹

In June 2010, a federal grand jury in Houston indicted Barry Walter Bujol, a US citizen from Hempstead, Texas, for attempting to provide material support to al-Qaeda, including personnel, money, prepaid phone cards, SIM cards, global positioning systems, cell phones and restricted publications on the effects of US

military weapons (e.g., UAS) in Afghanistan.⁵² On the same day, an Ohio couple from Toledo, Hor I. and Amara A. Aki, dual US-Lebanese citizens, were arrested for conspiring to provide material support to Hezbollah.⁵³ And on June 5, 2010, two New Jersey men (Mohamed Mahmood Alessa and Carlos Eduardo Almonte) were arrested at Kennedy International Airport as they attempted to board separate planes for Somalia. The two men intended to join al-Shabab and receive training in Somalia in order to kill American troops.⁵⁴ Finally, to further illustrate the ability of al-Qaeda to recruit and direct terrorist operations in the West, on July 8, 2010, Norwegian officials announced the arrest of three al-Qaeda operatives for their roles in plotting a foiled 2009 New York subway attack and planning to blow up a shopping center in Manchester, England.⁵⁵

In response to continuing al-Qaeda activities and threats aimed at US interests at home and abroad, President Obama indicated in November 2009 that terrorist networks like al-Qaeda remained the greatest threat to US security.⁵⁶ Similarly, Secretary of State Clinton stated in February 2010 that the greatest threat to the United States was transnational non-State terrorist networks like al-Qaeda, commenting that al-Qaeda was a “very committed, clever, diabolical group of terrorists who are always looking for weaknesses and openings.”⁵⁷ On March 9, 2010, the US Maritime Administration issued an advisory that warned ships transiting the Bab-el-Mandeb Strait, Red Sea and the Gulf of Aden along the coast of Yemen that al-Qaeda remains interested in maritime attacks in these waters and that the attacks could be similar in nature to the attack against the *USS Cole* (2000) or the *M/V Limberg* (2002), “where a small to mid-size boat laden with explosives was detonated in the vicinity of the targeted ships.”⁵⁸ The advisory further indicated, however, that “it cannot be ruled out that the extremists may be capable of other[,] more sophisticated methods of targeting, such as the use of missile[s] or projectiles to target ship[s] such as the mortars used to target a Navy ship in Jordan in 2005.” Finally, a May 2010 Department of Homeland Security memo indicates that “the number and pace of attempted [terrorist] attacks against the United States over the past nine months have surpassed the number of attempts during any other previous one-year period” and that terrorists will attempt to conduct strikes within the United States with “increased frequency” and with “little or no warning.”⁵⁹

In short, despite the substantial progress that has been made toward eliminating the threat posed by terrorists, al-Qaeda and its affiliates remain a potent and determined force with the capability and intent to strike the US mainland, its allies and US interests abroad at every opportunity with the most destructive means at their disposal. The militant groups continue to train and equip their fighting forces in order to plan and execute devastating attacks against the United States and its allies

around the world. Under these circumstances, international law allows the United States to preemptively use proportionate force in self-defense to eliminate the continuing and imminent threat posed by al-Qaeda and other terrorist groups. Whether one agreed or disagreed with the former Bush administration's initiatives following 9/11, the President's statement in 2004 regarding the war on terror cannot be ignored:

The war on terror is not a figure of speech. It is an inescapable calling of our generation. . . . There can be no separate peace with the terrorist enemy. Any sign of weakness or retreat simply validates terrorist violence and invites more violence for all nations. The only certain way to protect our people is by early, united, and decisive action.⁶⁰

Until the threat is effectively eliminated, the United States can continue to use force in self-defense against al-Qaeda and its supporters, to include the use of unmanned systems.

Despite disagreements with some of the Bush administration's policies with regard to the wars in Afghanistan and Iraq, the Obama administration appears to have adopted the Bush approach to the use of drones in Pakistan and elsewhere. On March 24, 2010, Department of State Legal Adviser Harold Koh delivered the keynote speech at the Annual Meeting of the American Society of International Law (ASIL). In part, Mr. Koh discussed the strategic vision of international law that the Obama administration was attempting to implement, what he called "The Law of 9/11: detentions, use of force, and prosecution."⁶¹ In defending US targeting of terrorists in Pakistan and elsewhere, Mr. Koh indicated that, as a matter of international law, the United States is engaged in an "armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law."⁶² Mr. Koh further emphasized that al-Qaeda continues to pose an imminent threat to the United States: "[A]l-Qaeda has not abandoned its intent to attack the United States, and indeed continues to attack us."⁶³ Accordingly, he continued, "the United States has the authority under international law, and the responsibility to its citizens, to use force, including lethal force, to defend itself, including by targeting persons such as high-level al-Qaeda leaders who are planning attacks."⁶⁴

III. Lawful Targeting of Belligerents v. Extrajudicial Killings/Assassination

Opponents to the use of drones argue that IHRL is the governing body of law that must be applied when using deadly force against terrorists outside the traditional combat zone. They further argue that IHRL prohibits extrajudicial killing. Under

an IHRL/law enforcement construct, deadly force should only be used as a last resort to save lives and only after lesser means have failed. Accordingly, before using deadly force, an attempt should be made to capture the terrorist or allow him/her an opportunity to surrender. They argue that the use of UAS to target terrorists in Pakistan, Yemen, Somalia and elsewhere violates the IHRL prohibition on extrajudicial killing, as well as the US ban on assassination in E.O. 12333.

These arguments incorrectly assume that the United States is not engaged in an armed conflict with al-Qaeda and that the targeted terrorist groups do not pose an imminent and continuing threat to the United States, either of which gives rise to the inherent right of self-defense. In short, nothing in E.O. 12333 or IHL/LOAC restricts the lawful use of force in self-defense against an enemy belligerent (privileged or unprivileged) or against a group that poses an imminent or continuing threat to the United States and its interests.

A. The Assassination Ban under E.O. 12333

Assassination of foreign nationals has been prohibited as a matter of US domestic policy since 1976 when President Ford signed E.O. 11905. Section 5(g) provides that “no employee of the United States Government shall engage in, or conspire to engage in, political assassination.”⁶⁵ The reference to “political” assassination was dropped by the Carter administration in E.O. 12036, opting instead to generically prohibit “assassination.”⁶⁶ An identical prohibition is found in section 2.11 of E.O. 12333.⁶⁷ Although “assassination” is not defined in the executive orders, the term involves the intentional killing (or murder) of a targeted individual committed for political purposes.⁶⁸ The purpose of E.O. 12333 is, therefore, to prevent the killing of foreign public officials for political purposes. It does not, however, limit the lawful use of force in self-defense against terrorists or other groups that pose an imminent or continuing threat to the security of the United States and its citizens.⁶⁹

It is widely recognized that enemy belligerents—whether members of the armed forces of a State or civilians and non-State actors directly participating in hostilities—may be lawfully targeted and killed at all times, subject to the IHL principles of military necessity and proportionality.⁷⁰ Therefore, the ambush by US aircraft and downing of the Japanese aircraft, over Bougainville, on April 18, 1943, carrying Admiral Isoroku Yamamoto, the Japanese commander of the Pearl Harbor attack, was not considered an assassination, but rather a lawful attack on an individual combatant—a legitimate military target.⁷¹ Likewise, President Reagan’s authorization to attack Moammar Gadhafi’s home in Libya following the 1986 Berlin discotheque bombing that killed an American service member and injured 230 others was not considered a violation of the executive order’s ban on assassination,

because Gadhafi was a legitimate military target.⁷² During the first Gulf War (1991), coalition aircraft targeted 580 command and control targets, including 260 leadership targets (e.g., Saddam Hussein's palaces and places that he frequented).⁷³ These attacks were not considered as violations of the assassination ban. Similarly, President Clinton authorized missile attacks against the Iraqi Intelligence Service (the *Mukhabarat*) headquarters on June 26, 1993 after he was informed that Kuwaiti forces had foiled an Iraqi-sponsored assassination attempt against former President George H.W. Bush.⁷⁴

Five years later, President Clinton again authorized cruise missile strikes, on this occasion against a chemical plant in Sudan and al-Qaeda training camps in Afghanistan after terrorists bombed the US embassies in Kenya and Tanzania, killing 224 people and injuring over 4,500 others.⁷⁵ None of the strikes authorized by President Clinton were considered violations of E.O. 12333. Finally, following 9/11, the Bush administration concluded that the assassination ban did not prevent the United States from targeting terrorist leadership and command and control capabilities in self-defense.⁷⁶ This determination was later used to justify the 2002 targeted killing of Qaed Salim Sinan al-Harethi, a senior al-Qaeda leader, in Yemen by a CIA drone.⁷⁷

Similarly, since 9/11, it is equally clear that under UN Security Council Resolution 1368 (2001) a State may use force in self-defense against acts of aggression by terrorist groups. It is also clear under customary international law and Article 51 of the Charter that a nation may use force in self-defense against the imminent or continuing threat of attack by these groups. Therefore, killing al-Qaeda members and other militants who are engaged in ongoing acts of violence against the United States and its allies, and who have the capabilities and stated intentions to continue to conduct such attacks in the future, is an act of self-defense, not murder, hence not assassination.

Based on the increased number of drone attacks authorized by President Obama against suspected terrorist targets in Pakistan's FATA, it appears that the Obama administration has taken a similar approach to that of its predecessor.⁷⁸ The administration's position on the issue of assassination was clearly articulated by the State Department Legal Adviser at the ASIL meeting. During his keynote address, Mr. Koh stated that

individuals who are part of . . . an [enemy] armed group are belligerents and, therefore, lawful targets under international law. . . .

[A] state that is engaged in an armed conflict or in legitimate self-defense is not required to provide targets with legal process before the state may use lethal force. . . .

[U]nder domestic law, the use of lawful weapons systems—consistent with the applicable laws of war—for precision targeting of specific high-level belligerent leaders when acting in self-defense or during an armed conflict is not unlawful, and hence does not constitute “assassination.”⁷⁹

B. Extrajudicial Killing under International Law

1. Reports and Correspondence of the Special Rapporteur to the UN Human Rights Council

In January 2003, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (hereinafter Special Rapporteur) submitted a report to the UN Human Rights Council indicating that a November 2002 UAS strike that killed six al-Qaeda militants in Yemen was a “clear case of extrajudicial killing.”⁸⁰ Despite finding that (1) the government of Yemen had approved the attack; (2) the militants (including a senior al-Qaeda official, Abu Ali al-Harithi) had been involved in the attacks on the *Cole* and the French oil tanker *Limburg*; (3) prior attempts to apprehend the suspects had been unsuccessful; and (4) “governments have a responsibility to protect their citizens against the excesses of non-State actors or other authorities” the Special Rapporteur determined that the actions by the United States and Yemen violated IHRL and IHL.⁸¹

In August 2005, a new Special Rapporteur (Philip Alston) sent a letter to the US government requesting information on the use of UAS to target and kill Haitham al-Yemeni, a senior al-Qaeda figure, on the Pakistan-Afghanistan border on May 10, 2005. The Special Rapporteur reiterated the view that questions of IHL fall squarely within his mandate and that “efforts to eradicate terrorism must be undertaken within a framework” governed by IHRL, as well as IHL.⁸² Dissatisfied with the US response to the August letter, the Special Rapporteur submitted a report to the Human Rights Council in May 2009 alleging that the United States is using drones to engage in targeted killings on the territory of other States and that these attacks have caused a number of civilian casualties. Mr. Alston additionally alleged that the United States had been evasive in responding to his questions regarding the legal basis for its targeting decisions and urged the Obama administration to reconsider the previous administration’s “positions and move to ensure the necessary transparency and accountability” for its drone program.⁸³ Having failed to receive a response from the new administration, Mr. Alston took his case to the “court of public opinion.” In October 2009, he reiterated his position in a *New York Times* article stating that “the United States must demonstrate that it is not randomly killing people in violation of international law through its use of drones

on the Afghan border" and that the US refusal to respond to UN "concerns that the use of drones might result in illegal executions was an 'untenable' position."⁸⁴

2. US Responses to the Special Rapporteur

The United States responded to the January 2003 al-Harithi report on April 14 of that year, indicating that "inquiries related to allegations stemming from any military operation conducted during the course of an armed conflict . . . [did] not fall within the mandate of the Special Rapporteur" and that the United States disagreed with his conclusion that "military operations against enemy combatants could be regarded as extrajudicial executions by consent of Governments."⁸⁵ In support of its position, the United States pointed out that military operations conducted by a government against legitimate military targets like al-Qaeda were governed by IHL/LOAC, which allows enemy combatants to be attacked unless they have surrendered or are otherwise rendered *hors de combat*. The US response further emphasized that the United States was at war with al-Qaeda and related terrorist networks and that, despite coalition successes around the world, the war was far from over. With operations in more than sixty countries, al-Qaeda had effectively trained, equipped and supported armed forces that have planned and executed attacks worldwide against the United States "on a scale that far exceeds criminal activity."⁸⁶ More important, al-Qaeda terrorists continued to plan additional attacks against the United States and its allies and were, therefore, subject to armed attack by US forces. In conclusion, the United States stressed that the military operations conducted against the United States and its nationals by al-Qaeda both before and after 9/11 "necessitate a military response by the armed forces of the United States"; to conclude otherwise would "permit an armed group to wage war unlawfully against a sovereign state while precluding that state from defending itself."⁸⁷

The United States submitted a similar response to the Special Rapporteur's letter requesting information regarding the killing of Haitham al-Yemeni on the Pakistan-Afghanistan border in May 2005. Recalling its April 2003 letter, the United States reemphasized that legitimate military operations conducted by a government during an armed conflict do not fall within the mandate of the Special Rapporteur and that the conduct of such operations is governed by IHL/LOAC. For the reasons previously stated in 2003, the United States reiterated that it was engaged in a continuing armed conflict with al-Qaeda and that the military operations conducted and planned against the United States and its nationals by the terrorist organization both before and after 9/11 necessitated a military response. The US response then went on to rebut the Special Rapporteur's position that his mandate included issues arising under IHL/LOAC. In response to the Special Rapporteur's assertion

that all major Human Rights Council and UN General Assembly resolutions in recent years referred explicitly to IHL, the United States pointed out that the mention of IHL in these resolutions is in the context of suggestions or admonitions to governments and “does not . . . impart upon the Special Rapporteur a mandate to consider issues arising under” IHL/LOAC.⁸⁸ The US response similarly rejected the Special Rapporteur’s argument that General Assembly Resolution 59/197 (2004) urged governments to take all necessary and possible measures, in conformity with IHRL and IHL, to prevent loss of life during armed conflicts. The United States pointed out that the Resolution did not expand or modify the mandate of the Special Rapporteur, but rather urged governments to take action, while directing the Special Rapporteur to continue to operate within his mandate. Finally, in response to the Special Rapporteur’s assertion that “every single annual report of the Special Rapporteur since at least 1992 has dealt with violations of the right to life in the context of international and non-international armed conflicts,” the United States noted that “while the Special Rapporteur may have reported on cases outside of his mandate, this does not give” him the competence to address such issues.⁸⁹

Regarding the scope of the Special Rapporteur’s mandate, it is also important to note that nothing in Commission on Human Rights Resolution 1982/29, which appointed the first Special Rapporteur to examine the questions related to summary or arbitrary executions, empowers the Special Rapporteur to consider matters involving armed conflict or IHL.⁹⁰ Similarly, nothing in General Assembly Resolution 60/251, which created the Human Rights Council as the replacement for the Commission on Human Rights, grants the Council competence over matters regarding IHL in general, or armed conflict in particular.⁹¹ Moreover, the Council is established as a subsidiary organ of the General Assembly; matters affecting international peace and security, aggression and the use of force in self-defense are under the cognizance of the Security Council, not the General Assembly.

3. Obama Administration’s Position

As evidenced by the Koh speech, the current administration’s position on the legality of using UAS to target al-Qaeda operatives in areas like the FATA parallels that of the previous administration:

[I]n all of our operations involving the *use of force*, including those in the armed conflict with al-Qaeda, the Taliban and associated forces, the Obama Administration is committed . . . to conducting ourselves in accordance with all applicable law. With respect to the subject of targeting, . . . *it is the considered view of this Administration—and it has certainly been my experience during my time as Legal Adviser—that US targeting*

practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war. . . .

[A]s a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law. As a matter of domestic law, Congress authorized the use of all necessary and appropriate force through the 2001 Authorization for Use of Military Force (AUMF). These domestic and international legal authorities continue to this day. . . .

[A]l-Qaeda has not abandoned its intent to attack the United States, and indeed continues to attack us. Thus, in this ongoing armed conflict, the United States has the authority under international law, and the responsibility to its citizens, to use force, including lethal force, to defend itself, including by targeting persons such as high-level al-Qaeda leaders who are planning attacks. . . . [T]his is a conflict with an organized terrorist enemy that . . . plans and executes its attacks against us and our allies while hiding among civilian populations. That behavior . . . makes the application of international law more difficult and more critical for the protection of innocent civilians. . . . [T]his Administration has carefully reviewed the rules governing targeting operations to ensure that these operations are conducted consistently with law of war principles, including . . . the principle of *distinction* . . . and . . . the principle of *proportionality*. . . . In U.S. operations against al-Qaeda and its associated forces—including lethal operations conducted with the use of unmanned aerial vehicles—great care is taken to adhere to these principles in both planning and execution, to ensure that only legitimate objectives are targeted and that collateral damage is kept to a minimum. . . .

[I]ndividuals who are part of such an armed group are belligerents and, therefore, lawful targets under international law. . . . [S]ome have argued that the use of lethal force against specific individuals fails to provide adequate process and thus constitutes *unlawful extrajudicial killing*. But a state that is engaged in an armed conflict or in legitimate self-defense is not required to provide targets with legal process before the state may use lethal force. . . . [S]ome have [also] argued that our targeting practices violate *domestic law*, in particular, the long-standing *domestic ban on assassinations*. But under domestic law, the use of lawful weapons systems—consistent with the applicable laws of war—for precision targeting of specific high-level belligerent leaders when acting in self-defense or during an armed conflict is not unlawful, and hence does not constitute “assassination.”⁹²

C. Application of IHL v. IHRL in the War on Terrorism

As discussed above, human rights advocates argue that targeting decisions in the war on terrorism are governed by both IHL and IHRL. The US government, on the other hand, has correctly taken the position that the targeting of enemy belligerents, including al-Qaeda terrorists outside the traditional combat zone, is governed solely by IHL. In short, enemy belligerents, whether members of the

armed forces of a nation, terrorists or other civilians directly participating in hostilities, do not enjoy a “right to life” during an armed conflict, irrespective of their location.

1. Are IHL and IHRL Complementary Regimes?

Proponents of the assassination/extrajudicial killing argument take the position that al-Qaeda terrorists are criminals to whom law enforcement rules and IHRL, not major military force and IHL, apply. Military force, they argue, may only be used in self-defense or as authorized by the UN Security Council. They argue that outside of these situations, States may only use law enforcement measures to combat terrorists,⁹³ and that drones are warfighting weapons, not law enforcement tools, and may, therefore, not be used to target terrorists outside the traditional combat zone.⁹⁴ Rather, law enforcement rules, such as the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (UN Basic Principles), govern when police can use force against civilians, including terrorists. They include such provisions as:

4. Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.

...

9. Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.⁹⁵

The proponents of IHRL applicability to the targeting of terrorists also cite the International Court of Justice (ICJ) *Nuclear Weapons* and *Wall* advisory opinions to support their position. In discussing the right to life in paragraph 25 of the *Nuclear Weapons* opinion, the ICJ stated that

[t]he protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be

deprived of [one's] life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.⁹⁶

Similarly, in the *Wall* opinion, the Court indicated in paragraph 106 that

the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.⁹⁷

2. Targeting of Enemy Belligerents Is Governed by IHL

Arguments advanced by proponents of the complementary IHL/IHRL model are misplaced from both a practical and a legal point of view. Human rights advocates would argue that US forces must first attempt to capture a suspected terrorist or provide him/her an opportunity to surrender before using lethal force.⁹⁸ From a practical perspective, such a suggestion borders on the ridiculous. These terrorists are hiding and operating in camps and strongholds located in some of the most remote and inaccessible areas in the world—in the FATA, Yemen, Somalia and elsewhere. Any attempt by US Special Forces to capture these terrorists would be virtually impossible to undertake—and likely suicidal. Moreover, what human rights advocates are suggesting is a retrospective approach to combating terrorism—capture and prosecute the terrorists, hopefully before and not after another 9/11 attack occurs. Such an approach is wishful thinking, at best.

A prospective approach—preventing attacks before they are planned and successfully executed—is necessary to protect the United States and its citizens against the real and continuing threat from al-Qaeda and its supporters.⁹⁹ There is simply no obligation in domestic or international law to provide due process (e.g., judicial review, offer to surrender, attempted capture, etc.) before using lethal force against known enemy belligerents, including terrorists, who present an imminent and continuing threat to the United States and its citizens. The Convention for the

Protection of Human Rights and Fundamental Freedoms (European Convention) recognizes that there is no “right to life” during armed conflict, by providing in Article 15.2 that “deaths resulting from lawful acts of war” are outside the scope of the Convention.¹⁰⁰

Reliance on the ICJ advisory opinions to support the position that IHRL applies to the targeting of al-Qaeda and other terrorists is also misplaced. The focus of the *Nuclear Weapons* opinion was not on the targeting of combatants, but rather on the catastrophic effects a nuclear weapon detonation would have on the civilian population. The Court questioned whether the use of nuclear weapons could discriminate between the civilian population and combatants and civilian objects and military objectives, indicating that the number of casualties that would ensue following the use of such a weapon would be enormous.¹⁰¹ UAS, with their enhanced ISR and precision targeting capabilities, can easily distinguish between military targets and protected people and places. Moreover, although there have been incidental civilian deaths associated with the use of drones, the numbers (as discussed below in the sections on proportionality and military necessity) are not excessive in terms of the military advantage that has been achieved, and would certainly not fall within the scope of casualties envisioned by the use of a nuclear weapon. Had the Court been asked, “Does an enemy combatant or civilian directly participating in hostilities have a ‘right to life’ during an armed conflict?” the Court would have said no. It is also important to note that, other than the reference to human rights in dicta in paragraphs 24 and 25, the Court applies IHL, not IHRL, in its analysis of the issues (paragraphs 74–96). Nor does the Court cite any authority for its novel declaration that IHRL applies during an armed conflict. Finally, in issuing its decisions, the Court relies on IHL, not IHRL, stating:

D. Unanimously,

A threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the *principles and rules of international humanitarian law*, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons;

E. By seven votes to seven, by the President’s casting vote,

It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the *principles and rules of humanitarian law*;

However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.¹⁰²

Similarly, the *Wall* advisory opinion focused on an occupation setting. It did not address the issue of targeting enemy combatants or civilians directly participating in hostilities. In fact, the Court recognizes in paragraph 106 that there are situations in which only IHL applies:

As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: *some rights may be exclusively matters of international humanitarian law*; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law (emphasis added).

Clearly, targeting of enemy combatants and civilians directly participating in hostilities falls into the first category—exclusively matters of IHL. Additionally, as was the case in the *Nuclear Weapons* opinion, the Court relies on IHL, not IHRL, in deciding the case:

For these reasons,

The Court . . . [decided]

D. By [a vote of] thirteen votes to two, [that]

[a]ll States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction; all States parties to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 have in addition the obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with *international humanitarian law* as embodied in that Convention.¹⁰³

Finally, some opponents to the use of drones have suggested that the rules should be different if the suspected terrorist is a US citizen. The fact that the intended target of a drone strike is an American citizen, such as radical cleric Anwar al-Awlaki who is hiding in Yemen, does not change the analysis. The citizenship of the belligerent is irrelevant in the targeting decision. In an al-Qaeda video posted on the Internet on May 23, 2010, al-Awlaki advocates the killing of American

civilians in retaliation for the death of Iraqi and Afghan civilians killed by US forces.¹⁰⁴ Americans do not have a right to wage war against the United States. If they do, they become lawful targets and may be engaged without “due process.” The Supreme Court held in *Ex parte Quirin* that US citizenship did not bar the prosecution of individuals as “enemies who have violated the law of war.”¹⁰⁵ The same logic would allow the direct engagement of a US citizen who has actively sided with al-Qaeda.¹⁰⁶

3. Does It Really Matter If IHRL Applies in an Armed Conflict?

Even if IHRL complemented IHL during periods of armed conflict, use of drones to conduct strikes against terrorists outside the combat zone in self-defense would not constitute a violation of IHRL. Although the ICJ indicated in the *Nuclear Weapons* advisory opinion that the right to life found in Article 6.1 of the International Covenant on Civil and Political Rights (ICCPR) applies in times of war, the Court went on to explain that

[t]he test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.¹⁰⁷

Under IHL, enemy belligerents, like the al-Qaeda terrorists, who have not surrendered and are not *hors de combat* may be lawfully engaged at all times, subject only to the principles of military necessity and proportionality. Such attacks would not constitute an arbitrary deprivation of life under the ICCPR.¹⁰⁸

It is also questionable whether the ICCPR would even apply to targeted killings in Pakistan and other places outside the traditional combat zone. Article 2.1 provides that “[e]ach State Party . . . undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant” (emphasis added). The ICJ similarly held in paragraph 111 of the *Wall* advisory opinion that the ICCPR is only “applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory” (e.g., in an occupation situation). The question of applicability of the Covenant therefore turns on whether the terrorist being targeted “is within the jurisdiction, actual power, or effective control of the state using the drone.”¹⁰⁹ Al-Qaeda terrorists and their supporters operating out of the FATA, Yemen or Somalia are not within the territorial

jurisdiction of the United States nor are these individuals within the actual power or control of the United States. In these circumstances, the ICCPR does not apply.

4. *So What Are Human Rights Advocates Really After?*

From the foregoing, it appears that there is nothing to gain by applying IHRL in an armed conflict scenario. In fact, application of the IHRL "arbitrary deprivation of life" standard would arguably provide far less protection than the IHL principles of military necessity and proportionality. So what are human rights advocates really trying to accomplish by arguing that IHRL applies in armed conflicts? The answer is simple: change the outcomes governed by IHL by adding IHRL into the equation, thereby making IHL more restrictive and channeling the enforcement of IHL through human rights mechanisms such as the Human Rights Council and regional human rights courts. To quote a human rights advocate:

We wish to (boldly) take human rights to places, be they extraterritorial situations, or those of armed conflict, where, as a matter of practical reality, no human rights have gone before. . . . [A] purpose of the IHL/IHRL project is the enforcement of IHL through human rights mechanisms. Thus, even if human rights substantively added nothing to IHL, there would still be a point in regarding IHL and IHRL as two complementary bodies of law. IHL, now (jurisdictionally) framed in human rights terms, could be enforced before political bodies, such as the Human Rights Council or UN political organs more generally, or through judicial and quasi-judicial mechanisms, such as the International Court of Justice, the European Court of Human Rights, the UN treaty bodies or domestic courts.¹¹⁰

The danger of allowing human rights mechanisms to review lawful military operations, whether in a traditional armed conflict or in the war on terrorism, is illustrated by the absurd decision of the European Court of Human Rights in the *McCann* case.¹¹¹ The British government had information that three known IRA terrorists were going to conduct a terrorist attack in Gibraltar by detonating a car bomb by remote control. While several UK soldiers were following them, it appeared that the terrorists were preparing for an attack. As one of the soldiers moved forward to arrest the suspects, he observed one of the terrorists move his hand as if he was about to press a button to detonate the bomb, and shot the suspect. A second terrorist then appeared as if she was going to donate the bomb and was shot. The third terrorist was also shot. A bomb was subsequently discovered in the car. After hearing seventy-nine witnesses, a jury in the United Kingdom brought back a verdict of lawful killing. Dissatisfied by that result, the decedents' estates brought the case to the European Court of Human Rights. Despite finding that "the soldiers honestly believed . . . that it was necessary to shoot the suspects in order to prevent

them from detonating a bomb and causing serious loss of life,” the Court nevertheless found by a vote of ten to nine that there had been a violation of Article 2 of the European Convention because the UK authorities had not taken “appropriate care in the control and organisation of the arrest operation.” Article 2.2 of the Convention provides that “deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence”¹¹²

A second example of this dangerous approach is the continuing efforts by Philip Alston, the current Special Rapporteur, to obtain information (much of which is classified) on the use of UAS to target terrorists in the FATA and other areas outside Afghanistan and Iraq. In May 2010, Mr. Alston called on the United States to stop using CIA operatives to conduct drone strikes against al-Qaeda terrorists.¹¹³ In a report delivered to the Human Right Council on May 28, Alston argues that “intelligence agents do not generally operate within a framework which places appropriate emphasis upon ensuring compliance with IHL, rendering violations more likely.”¹¹⁴ Alston’s report also questions the validity of a portion of the International Committee of the Red Cross’s (ICRC’s) *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* that allows for the targeting of civilians who are members of an armed group who have a continuous combat function (CCF). According to the report, the “ICRC’s Guidance raises concern from a human rights perspective” because the CCF category of armed group members may be targeted anywhere, any time. The report concludes that “the creation of CCF category is, *de facto*, a status determination that is questionable given the specific treaty language that limits direct participation to ‘for such time’ as opposed to ‘all the time.’”¹¹⁵ The report therefore recommends, *inter alia*, that “[t]he High Commissioner for Human Rights should convene a meeting of States, including representatives of key military powers, the ICRC and human rights and IHL experts to arrive at a broadly accepted definition of ‘direct participation in hostilities.’”¹¹⁶ It would appear from this report that Mr. Alston believes that the Special Rapporteur and human rights organizations like the Human Rights Council are more qualified than the ICRC and States parties to the Geneva Conventions to decide IHL issues of this nature. I would suggest that determining whether a civilian has directly participated in hostilities under the Geneva Conventions and may therefore be targeted by belligerent forces is clearly outside the mandate of the Special Rapporteur contained in Resolution 8/3 of the Human Rights Council and further demonstrates the overreaching by human rights advocates and organizations.¹¹⁷

In short, the United States has nothing to gain by acknowledging that IHRL applies alongside IHL in armed conflict situations, particularly in the targeting

process. Human rights groups, whether non-governmental or governmental, are generally biased against military operations conducted by any state and military operations conducted by the United States, in particular. They (and their financial supporters) generally oppose a strong military establishment, seek to level the playing field between modern armed forces and insurgent groups/terrorists and endeavor to create a standard of zero collateral damage and incidental injury in war. Any report or decision issued by these organizations would inevitably be critical of US operations and would provide yet another source of information that can be exploited by our enemies.

IV. Host Nation Consent v. Self-Help in Self-Defense

Following setbacks in Iraq and Afghanistan, al-Qaeda has been able to reconstitute and establish bases of operation in the FATA, which have served as a "staging area for al-Qaeda attacks in Afghanistan," as well as a base for its worldwide training operations.¹¹⁸ In fact, most of the high-priority terrorists, who continue to actively plot against the United States, remain in hiding in some of the most remote, inaccessible parts of the world, including the FATA.¹¹⁹ To date, Pakistan has been unable or unwilling to prevent cross-border attacks against coalition forces in Afghanistan or to disrupt terrorist planning and training efforts to conduct attacks against the United States and its allies worldwide. That leaves the United States with two options—wait for another terrorist attack or use UAS to conduct strikes against these inaccessible targets.

A. Host Nation Consent

Opponents to the use of UAS to strike targets in nations outside the combat zone argue that host nation consent is required for such attacks, "unless the state where the group is present is responsible for their actions."¹²⁰ Although there is some evidence that senior leadership within Pakistan tacitly consented to the drone strikes by providing bases for UAS operations and targeting information to US forces and the CIA, Pakistan has not officially consented to the attacks and has often publicly protested the strikes as a violation of its sovereignty and territorial integrity.¹²¹ Accordingly, the opponents to the use of UAS argue that there is no legal basis for the United States to attack terrorist targets in Pakistan or in any other nation outside of the combat zone.

B. Sovereignty v. Inherent Right of Self-Defense

The opponents' position appears to be premised on the flawed assumption that territorial integrity and State sovereignty are paramount in international law. The

long-standing view of the United States on the issue of sovereignty, as articulated by a former legal adviser to the US Department of State and a leading international law scholar, is that “[t]erritorial integrity is not entitled to absolute deference in international law, and our national defense requires that we claim the right to act within the territory of other States in appropriate circumstances.”¹²² President Obama reaffirmed this long-standing position in an address at West Point in 2009, indicating that the United States “cannot tolerate a safe-haven for terrorists whose location is known, and whose intentions are clear.”¹²³ The US position is supported by Articles 2(4) and 51 of the Charter, which make clear that territorial integrity and sovereignty give way to the right of self-defense.

C. Self-Help

It is equally well settled that States have an obligation under international law “to control persons within their borders to ensure that they do not utilize their territory as a base for criminal activity.”¹²⁴ Both domestic courts and international tribunals have acknowledged this obligation. For instance, the US Supreme Court held in 1887 that “[t]he law of nations requires every national government to use ‘due diligence’ to prevent a wrong being done within its own dominion to another nation with which it is at peace, or to the people thereof.”¹²⁵ The ICJ has similarly held that every State has an “obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.”¹²⁶

It is equally well settled that, if a nation is unwilling or unable to stop terrorists or other armed groups from using its territory as a location from which to launch attacks against another nation or its citizens, the aggrieved State has the right to strike the terrorists or other armed groups within the territory of the host nation.¹²⁷ The State Department Legal Adviser reiterated this right in his remarks at the ASIL meeting:

[W]hether a particular individual will be targeted in a particular location will depend upon considerations specific to each case, including those related to the imminence of the threat, the sovereignty of the other states involved, and the *willingness and ability of those states to suppress the threat the target poses*.¹²⁸

Much of the FATA is inaccessible to Pakistani security forces. Additionally, the Pakistani army has been reluctant to conduct offensive military operations against militant groups in North Waziristan “because it does not want to antagonize powerful insurgent groups there that have so far attacked only targets in Afghanistan.”¹²⁹ In short, Pakistan has been unable and unwilling to prevent use of its territory by al-Qaeda and other militant groups that continue to plan and

conduct terrorist attacks against the United States and its allies. Under these circumstances, the United States has the inherent right under international law to use force in self-defense against terrorist targets in Pakistan.

D. A History of Self-Help

Self-help is nothing new to the United States—our history is replete with examples of the use of necessary and proportionate force in self-defense where a “neutral” nation has been unable or unwilling to prevent the use of its territory as a staging base for attacks. Some examples include:¹³⁰

- 1814, 1816 and 1818 Seminole Indian attacks. The United States used force in self-defense against attacks by Indians and former slaves emanating from Spanish Florida without the consent of Spain. The attacks were not directed at Spain nor was the United States at war with Spain at the time.

- 1817 Amelia Island occupation. The United States used force in self-defense to attack non-State actors (pirates, smugglers and privateers) on Amelia Island, relying, in part, on “Spain’s inability to control misuse of its islands to prevent armed attacks on U.S. territory and shipping . . . emanating from the islands.” At the time, the United States was not at war with Spain and assured Spain that the temporary occupation of Amelia Island was not a threat to its sovereignty. The US military actions were taken without Spanish consent.

- 1837 *Caroline* incident. The *Caroline* case also provides an example of the use of force in self-defense against non-State actors without the consent of the host nation. The United Kingdom was not at war with the United States when it attacked the *Caroline* in US waters to prevent future insurgent attacks emanating from the United States into Canada. The attack was directed at the insurgents, not the United States, and was not viewed as an act of war by the US government.

- 1854 Greytown bombardment. The US Navy bombarded the town of Greytown, Nicaragua after the citizens of the town forcibly took possession of the town, established their own government (not recognized by the United States), and attacked a US diplomat and engaged in other acts of violence against US nationals. In deciding whether the President had the power to order such an attack, Justice Nelson of the US Supreme Court held that the President had the authority to use force “as part of a power of protection of US nationals abroad against acts of lawless violence and an irresponsible and marauding community.” The bombardment was conducted without the consent of Nicaragua.

- 1916 Pancho Villa raids. In 1916, President Wilson authorized US forces to attack Pancho Villa’s forces in Mexico after they had crossed into the United

States and attacked towns in Texas and New Mexico. A second incursion was authorized later that year when Mexican bandits attacked Glen Springs, Texas.

- 1998 cruise-missile strikes. President Clinton authorized cruise-missile strikes against al-Qaeda training camps in Afghanistan without the consent of the Taliban government after al-Qaeda bombed the US embassies in Nairobi, Kenya and Dar es Salaam, Tanzania. The terrorist attacks killed more than 250 persons and injured over 5,500. The strikes were justified as self-defense in response to prior armed attacks and to prevent future attacks against the United States by al-Qaeda.

As these examples illustrate, while a nation's sovereignty is an important factor that must be taken into consideration before conducting a cross-border strike, it does not take precedence over a right of self-defense where that nation has been unable or unwilling to prevent the use of its territory as a base of operations for attacks. Article 51 of the Charter also makes clear that sovereignty and territorial integrity give way to this inherent right of self-defense against an armed attack or imminent threat of armed attack. Pakistan has been unable (due to inaccessible terrain) or unwilling (due to political considerations) to prevent militant groups from using the FATA to plan and attack the United States and its allies. Under these circumstances, the United States is legally justified in using force in self-defense, including UAS strikes, to prevent future attacks from Pakistani territory.

V. Do Drone Strikes Violate Traditional Principles of IHL/LOAC?

Basic principles of IHL affect all phases of the targeting cycle. This is particularly true during the target development, validation, nomination and prioritization phase, as well as the mission planning and force execution phases. However, IHL recognizes that military forces cannot engage in hostilities without some degree of incidental injury to protected persons and collateral damage to protected objects. The key is the determination of how to minimize incidental injury to civilians and collateral damage to civilian objects consistent with mission accomplishment and the law.

As a general rule, "the right of belligerents to adopt means of injuring the enemy is not unlimited."¹³¹ Additionally, "[t]he civilian population as such, as well as individual civilians, shall not be the object of attack."¹³² In this regard, when conducting military operations, commanders must

- do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects . . . but are military objectives . . . ;

- take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects; [and]
- refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects . . . which would be excessive in relation to the concrete and direct military advantage anticipated.¹³³

Commanders must also be prepared to cancel or suspend an attack

if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, or damage to civilian objects . . . which would be excessive in relation to the concrete and direct military advantage anticipated.¹³⁴

Based on the foregoing, it is clear that incidental injury of civilians and collateral damage to civilian objects is not prohibited by IHL; what is prohibited is excessive injury or damage in relation to the military advantage expected to be gained by the use of force. In other words, the wanton destruction of life and property as an end in itself violates IHL, but the law does not prohibit the use of force, even overwhelming force, by a military commander to compel the complete submission of the enemy in order to protect the safety of his force and facilitate the success of his mission.¹³⁵ Therefore, attacks by UAS that unintentionally cause incidental injury to civilians or damage to civilian property, in addition to killing the intended targets, e.g., an insurgent leader, are fully consistent with IHL to the extent the injury or damage is not excessive when compared to the military advantage gained by the attacks.

Compliance with IHL is much more complex in the current conflict with al-Qaeda because insurgent forces routinely commingle with the civilian population and operate from protected places. It becomes exceedingly more difficult to minimize incidental injury and collateral damage in such situations because of the difficulties encountered in distinguishing combatants from civilians and military objects from civilian objects. Under these circumstances, al-Qaeda and its supporters must be held primarily responsible for any collateral damage and incidental injury in such cases because they have failed to comply with their obligation to "avoid locating military objectives within or near densely populated areas."¹³⁶ Additionally, one must consider whether the civilians are deliberately acting as voluntary human shields for the insurgent forces, in which case, they may be considered to be directly participating in hostilities and therefore subject to attack.¹³⁷

A. Military Necessity

The purpose of IHL is to ensure that hostilities are directed toward the enemy and not used to cause unnecessary human suffering and physical destruction. The principle of military necessity limits suffering and destruction to that which is necessary to achieve a valid military objective. When applying this principle, the commander should ask whether the object of attack is a valid military objective and, if so, whether the total or partial destruction, capture or neutralization of the object will constitute a definite military advantage under the circumstances existing at the time of the attack. This does not mean, however, that overwhelming force cannot be used to destroy a valid military objective if consistent with the principles of distinction and proportionality discussed below.¹³⁸

Opponents to the use of UAS to conduct strikes outside the traditional combat zone argue that drone attacks violate the principle of military necessity because they fuel anti-Americanism in the FATA and do little to weaken the al-Qaeda organization.¹³⁹ Opponents argue that killing innocent civilians invites retaliation and aids al-Qaeda recruitment efforts in the FATA and elsewhere by antagonizing the local population, alienating surviving family members and creating martyrs.¹⁴⁰ The opponents point to statements by some Pakistani military officers who have confirmed that drone strikes motivate local tribesmen in the FATA to fight against the Pakistani government because the attacks are viewed as a breach of Pakistan's sovereignty.¹⁴¹ It is therefore argued that, if the military objective of defeating al-Qaeda cannot be achieved because drone strikes do not weaken the terrorist organization as intended, but rather have had unforeseen consequences of fueling anti-American sentiments and assisting al-Qaeda's recruitment efforts, the attacks violate the principle of military necessity.¹⁴²

These arguments, which are not supported by independent studies, are based on exaggerated civilian casualty figures. They also fail to acknowledge that, in the past two years alone, UAS strikes have killed over 500 militants, including 39 top-tier and mid-to-high-level leaders, thereby disrupting al-Qaeda's ability to operate with impunity from the FATA.¹⁴³ An independent study by the New America Foundation puts the number of militants killed at between 618 and 966.¹⁴⁴ More important, since December 2009, the terrorist organization has been dealt a number of serious blows by successful drone attacks against several high-ranking al-Qaeda officials. In December, Saleh al-Somali, a senior planner responsible for al-Qaeda operations outside Afghanistan and Pakistan, was killed by a drone strike in northern Waziristan.¹⁴⁵ Al-Qaeda operations were dealt further crippling blows in April 2010 and May 2010 with the deaths of the two top al-Qaeda leaders in Iraq, Abu Ayyub al-Masri and Abu Umar al-Baghdadi, and the death of the number-three official in the organization and overall commander for al-Qaeda in Afghanistan,

Mustafa Abu al-Yazid.¹⁴⁶ Equally important, drone strikes have effectively impaired al-Qaeda operations by creating an "atmosphere of fear and distrust among members" of the organization, with reports indicating that militant leaders sleep outside of their homes for fear of being targeted by a drone and suspected spies are routinely executed for providing information to the United States.¹⁴⁷

Independent studies by the New America Foundation and the Aryana Institute for Regional Research and Advocacy (AIRRA), as well as *Reuters* reporting, also do not support the allegations that civilian casualties in the FATA are fueling anti-American sentiments and assisting al-Qaeda recruiting efforts. First, despite claims to the contrary, there have been no major public protests in the FATA against the use of drones. Moreover, the number of civilian casualties in the FATA is much lower than the numbers claimed by militant groups and opponents to the use of drones in Pakistan. The New America Foundation study shows that the 131 reported drone strikes in the FATA since 2004 "have killed approximately between 908 to 1,347 individuals, of whom around 618 to 966 were described as militants in reliable press accounts"; thus less than 30 percent of the total casualties were civilians.¹⁴⁸

The AIRRA study also concluded that anti-Americanism in the FATA has not increased significantly due to US drone attacks.¹⁴⁹ Between November 2009 and January 2010, AIRRA sent five teams of five researchers each to conduct a public opinion survey about UAS attacks in areas of the FATA most often targeted by US drones. The following are the questions posed by the survey teams and the responses of the people of the FATA:

- Do you see drone attacks bringing about fear and terror in the common people? (Yes 45%, No 55%)
- Do you think the drones are accurate in their strikes? (Yes 52%, No 48%)
- Do you think anti-American feelings in the area increased due to drone attacks recently? (Yes 42%, No 58%)
- Should Pakistan military carry out targeted strikes at the militant organisations? (Yes 70%, No 30%)
- Do the militant organisations get damaged due to drone attacks? (Yes 60%, No 40%)

Local residents were also asked questions concerning sovereignty and civilian casualties. Regarding territorial integrity, people were asked if US drone attacks on

the FATA were viewed by the local population as a violation of Pakistani sovereignty. More than two-thirds said they were not. "Pakistan's sovereignty, they argued, was insulted and annihilated by Al-Qaeda and the Taliban, whose territory FATA is after Pakistan lost it to them. The US is violating the sovereignty of the Taliban and Al-Qaeda, not of Pakistan."¹⁵⁰ Moreover, more than two-thirds of the people interviewed consider "Al-Qaeda and the Taliban as enemy number one" and a large majority (nearly two-thirds) want the United States "to continue the drone attacks because the Pakistani army is unable or unwilling to retake the territory from the Taliban."¹⁵¹ Although there was some concern over civilian casualties and collateral damage, most of the people interviewed indicated that most of the drone attacks hit their intended targets. In fact, they indicated that most of the collateral damage is to houses rented to the militants. Additionally, local residents indicated that the Taliban and al-Qaeda terrorists normally seal off the area after a drone attack in order to remove everything, including militant casualties, from the site before allowing locals to return to their homes. As a result, an accurate battle damage assessment is not possible. In short, the AIRRA study contradicts the assertion of the impact of civilian casualties on anti-Americanism and "the mantra of violation of the sovereignty of Pakistan perpetuated by the armchair analysts in the media."¹⁵²

The results of the AIRRA study were subsequently confirmed by a *Reuters* special report. In a May 2010 interview, a tribal elder from the FATA told a *Reuters* reporter that the residents of northern Waziristan "want to get rid of the Taliban and if the Pakistani army cannot do it now, then . . . drone attacks . . . [are] fine with them."¹⁵³ He further indicated that "[t]here is no anger against the strikes as long as civilians are safe" and that "[t]here have been civilian deaths but not in big numbers."¹⁵⁴ A second tribal leader indicated: "We prefer drone strikes than army operations because in such operations, we also suffer. But drones hit militants and it is good for us."¹⁵⁵ Based on these independent reports and surveys, allegations that drone strikes violate the principle of military necessity are clearly misplaced.

B. Proportionality

The principle of proportionality is concerned with weighing the military advantage one expects to gain by an attack against the unavoidable and incidental harm to civilians and damage to civilian property that will result from the attack. This principle requires the commander to determine whether incidental injury to civilians and damage to civilian objects that may result from the attack will be excessive in relation to the concrete and direct military advantage expected to be gained.¹⁵⁶

Opponents to the use of drones outside the traditional combat zone also argue that killing a large number of civilians in an attempt to kill one terrorist leader violates the principle of proportionality.¹⁵⁷ This argument is based on alleged civilian

casualty rates of fifty innocent civilians killed to each militant targeted—"[a]t a ratio of 50 to 1, the disproportionate impact of drone attacks in Pakistan represents a serious violation of the traditional rules of war."¹⁵⁸

The opponents' position that UAS cause unnecessary and disproportionate harm to the civilian population is flawed for a number of reasons. First, as indicated above, the number of actual civilians killed by UAS strikes in Pakistan is significantly lower than the numbers reported by the opponents to the use of drones. The New America Foundation study shows innocent civilian casualties caused by drone strikes at around 30 percent.¹⁵⁹ These figures have been confirmed by a senior Pakistani military officer who indicated that "he believed that a third of the dead were militants, a third sympathizers and a third innocent civilians."¹⁶⁰ And some US and Pakistani intelligence estimates put the number of non-combatant civilian casualties—primarily family members who live and travel with targeted militants—as low as 5 and 20 percent, respectively.¹⁶¹ Second, the opponents' argument incorrectly assumes that the principle of proportionality requires a comparison between the number of innocent civilians killed or wounded and the number of terrorists killed or wounded. Rather, what the proportionality principle actually requires is a balancing of incidental injury to civilians and collateral damage to civilian property against the military advantage expected to be gained by the attack, as determined by the military commander—not by the ICRC, Human Right Council, Human Rights Watch or the Special Rapporteur. The commander's decision is based on validated, real-time, reliable intelligence; target evaluation in light of the campaign plan (e.g., top-tier, high-level, mid-level leader or low-level operative); presence of civilians at the target and their statuses (e.g., voluntary or involuntary human shields, women and children); location of the target (e.g., protected place, civilian object, safe house, terrorist training camp); and his or her experience as a commander. Each target is carefully scrutinized and analyzed through a complex targeting approval process which considers all of these factors in light of the most recent real-time intelligence.

C. Distinction

The principle of distinction is concerned with distinguishing combatants from civilians and military objects from civilian objects so as to minimize harm to civilians and damage to civilian property.¹⁶² To achieve this result, military commanders have a duty to distinguish their forces from the civilian population (e.g., through the wearing of uniforms or other distinctive signs) and distinguish valid military objectives from civilians or civilian objects before attacking.¹⁶³

Opponents of the use of drones argue that, even if a US drone operator is reasonably certain that the intended target is a valid military objective (e.g., an

al-Qaeda terrorist), he or she is still obligated to minimize civilian injuries. Because suspected terrorists wear civilian clothes and commingle with the local population, they cannot be clearly distinguished from the innocent civilians, even by high-tech drones. Citing Article 50(1) of Additional Protocol I (AP I), which provides that “in case of doubt whether a person is a civilian, that person shall be considered to be a civilian,” opponents to the use of drones argue that if there is any uncertainty as to whether or not a person is a suspected militant (because he is wearing civilian clothes or has commingled with the civilian population, etc.), IHL presumes that the person is a protected civilian.¹⁶⁴

Such a position rewards terrorists for violating the very laws that opponents to the use of drones seek to use to protect them from attack. Moreover, it encourages further violations by the militants, thereby increasing the danger to the civilian population. It also ignores the enhanced precision and restraint drones bring to the targeting process as compared to a pilot with limited information in the cockpit or the commander of a long-range artillery battery.¹⁶⁵ Improved ISR capabilities, “lack of fear-induced haste, reduced anger levels” and clearer battle damage assessments all combine to enhance awareness of protected persons and objects in the target area and restraint on the part of drone operators to engage such persons or objects.¹⁶⁶ More important, the opponents’ position ignores basic rules of IHL that prohibit belligerents from using protected persons and protected objects to render certain areas, objects or belligerent forces immune from attack.¹⁶⁷ In this regard, Article 51(7) of AP I provides that “[t]he Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.” Article 58(b) additionally provides that “[t]he Parties to the conflict shall, to the maximum extent feasible[,] . . . avoid locating military objectives within or near densely populated areas.” Militants violate these principles on a daily basis by commingling with the civilian population and enlisting the voluntary and involuntary aid of human shields to enhance their operations and mobilize public opinion against the United States when UAS strikes cause incidental injury or collateral damage. They store their ammunition in mosques, place weapons on top of schools and hospitals, use ambulances to deliver suicide bombs and set up command and control centers in private homes, and then exploit the resulting injury or damage when these protected places or objects are attacked.¹⁶⁸

Even though UAS are among the most precise weapons in the US inventory today, incidental injury to innocent civilians and collateral damage to civilian property is inevitable, particularly in light of the manner in which terrorists fight and operate. The State Department Legal Adviser highlighted this fact in his remarks:

[T]his is a conflict with an organized terrorist enemy that does not have conventional forces, but that plans and executes its attacks against us and our allies while hiding among civilian populations. That behavior . . . makes the application of international law more difficult and more critical for the protection of innocent civilians.¹⁶⁹

Although these repeated IHL violations do not relieve the United States of its obligation under the law to take all feasible precautions to minimize incidental loss of civilian life and damage to civilian objects, the terrorists' actions must be taken into consideration when determining the legality and proportionality of an attack against militants who have taken refuge in the civilian population and engaged in hostilities from protected places.¹⁷⁰

D. US Adherence to IHL in the Targeting Process

The Obama administration (as well as the previous administration) has continued to adhere to basic principles of IHL when targeting al-Qaeda terrorists outside the traditional combat zone. Koh emphasized that administration officials have

carefully reviewed the rules governing targeting operations to ensure that these operations are conducted consistently with law of war principles, including: . . . the principle of *distinction*, which requires that attacks be limited to military objectives and that civilians and civilian objects shall not be the object of the attack; and . . . the principle of *proportionality*, which prohibits attacks that may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, that would be excessive in relation to the concrete and direct military advantage anticipated. In U.S. operations against al-Qaeda and its associated forces—including lethal operations conducted with the use of unmanned aerial vehicles—great care is taken to adhere to these principles in both planning and execution, to ensure that only legitimate objectives are targeted and that collateral damage is kept to a minimum.¹⁷¹

In short, drone attacks are being conducted in accordance with US obligations under IHL.

VI. Use of Civilian UAS Operators to Target Terrorists

Today, more than ever, civilian contractors are increasingly being utilized to support combat forces across the entire spectrum of military operations, to include intelligence, planning, technical support, logistics and communications support functions. Civilian contractors play critical roles as analysts, trainers, computer programmers and maintenance technicians for high-tech unmanned systems. The 1907 Hague Regulations and the 1949 Third Geneva Convention both recognize that civilians will support and accompany the armed forces in times of armed

conflict.¹⁷² AP I, Article 50 further recognizes that these individuals, notwithstanding their affiliation with the armed forces, are still considered to be “civilians” for purposes of targeting and Article 51 specifies that civilians “shall not be the object of attack.”¹⁷³ Article 27 of the Fourth Geneva Convention similarly provides that “protected persons . . . shall at all times be . . . protected . . . against all acts of violence.”¹⁷⁴ Therefore, although the nature of their duties, and/or proximity to or presence in the combat zone, may increase the risk that these civilian contractors may be incidentally injured or killed, as long as they do not directly participate in hostilities, they are not subject to direct attack.

Civilians lose their protected status if they directly participate in the hostilities. AP I, Article 51 provides that “[c]ivilians shall enjoy the protection afforded by this section, *unless and for such time as they take a direct part in hostilities*” (emphasis added). Similarly, Common Article 3 of the 1949 Geneva Conventions provides that “persons *taking no active part in the hostilities* . . . shall in all circumstances be treated humanely” (emphasis added). Consequently, civilian contractors or CIA operatives who conduct drone strikes against military objectives would be considered to be directly participating in hostilities and could be lawfully targeted by the enemy.

A. Inherently Governmental Functions

DoD avoids this issue by prohibiting its civilian personnel and contractors from engaging in functions that are inherently governmental, including combat operations.¹⁷⁵ Pursuant to DoD guidelines, civilians are prohibited from participating in combat operations if the planned use of disruptive and/or destructive combat capabilities is an inherent part of the mission.¹⁷⁶ Combat operations include actively seeking out, closing with and destroying enemy forces, including employment of firepower and other destructive and disruptive capabilities on the battlefield.¹⁷⁷ Consistent with this guidance, only US military personnel may operate US weapons systems against the enemy.

B. Direct Participation in Hostilities

Opponents to the use of UAS to conduct strikes outside the traditional combat zone argue that CIA operatives and civilian contractors conducting such strikes are unlawful combatants and may not participate in hostilities.¹⁷⁸ This position is contrary to the majority view expressed by most law of war scholars, who hold that it is not a war crime for civilians to participate in hostilities, but if they do, they are not entitled to combatant immunity under domestic law for their belligerent acts.¹⁷⁹ Even the Special Rapporteur (Philip Alston) would agree that under IHL “civilians . . . are not prohibited from participating in hostilities.”¹⁸⁰ In his report filed with

the Human Rights Council in late May, Alston indicates that direct participation in hostilities is not a war crime, but that there are consequences that flow from such participation.

First, because they are directly participating in hostilities by conducting targeted killings, intelligence personnel may themselves be targeted and killed. Second, intelligence personnel do not have immunity from prosecution under domestic law for their conduct. Thus CIA personnel could be prosecuted for murder under the domestic law of any country in which they conduct targeted drone killings, and could also be prosecuted for violations of applicable US law.¹⁸¹

The aforementioned discussion assumes, of course, that the United States is engaged in an armed conflict with al-Qaeda and its affiliates. If the opponents to the use of drones are correct in arguing that the United States is not at war with al-Qaeda, then civilian operators would not be considered "unlawful combatants" and their actions could be legally justified as a "lawful exercise of the customary sovereign right of self-defense against a non-state actor."¹⁸²

VII. Targeting Terrorists Who Directly Participate in Hostilities

Questions concerning who may be targeted by a UAS strike have also been raised by opponents to the use of drones. These questions center on what activity constitutes direct participation in hostilities (DPH) and how long individuals who have directly participated in hostilities may be targeted. In his May 2010 report, Philip Alston indicates that

regardless of the enemy's tactics, in order to protect the vast majority of civilians, direct participation may only include conduct close to that of a fighter, or conduct that directly supports combat. More attenuated acts, such as providing financial support, advocacy, or other non-combat aid, does [sic] not constitute direct participation. . . . Thus, although illegal activities, e.g., terrorism, may cause harm, if they do not meet the criteria for direct participation *in hostilities*, then States' response must conform to the lethal force standards applicable to self-defence and law enforcement.¹⁸³

Other critics have similarly argued that IHL "supports decisions in favor of sparing life and avoiding destruction in close cases."¹⁸⁴

Neither the Geneva Conventions nor the Additional Protocols define DPH. In an effort to fill this gap, the ICRC issued the non-binding *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*.¹⁸⁵ In essence, the ICRC guidelines address three questions:

- Who is considered a civilian for the purposes of the principle of distinction?

- What conduct amounts to direct participation in hostilities?
- What modalities govern the loss of protection against direct attack?

A. Who Is a Civilian?

The ICRC takes the position that, in an international armed conflict, “all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse* are civilians and . . . entitled to protection against direct attack unless and for such time as they take a direct part in hostilities.”¹⁸⁶ For a non-international armed conflict, the ICRC maintains that

all persons who are not members of State armed forces or organized armed groups of a party to the conflict [i.e., armed forces of a non-State party to the conflict who continuously take a direct part in hostilities (continuous combat function)] are civilians and . . . entitled to protection against direct attack unless and for such time as they take a direct part in hostilities.¹⁸⁷

B. What Constitutes DPH?

An act must meet the following criteria in order to constitute DPH under the *Interpretive Guidance*:¹⁸⁸

- **Threshold of Harm.** An act likely to adversely affect the military operations or military capacity of a party to an armed conflict or to inflict death, injury or destruction on protected persons or objects.
- **Direct Causation.** There must be a direct causal link between the act and the harm likely to result from that act or from a coordinated military operation of which that act constitutes an integral part.
- **Belligerent Nexus.** The act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another.

C. Loss of Protected Status

The third question, concerning belligerent nexus, addresses a number of issues, including the length of the period during which civilians lose their protected status if they directly participate in hostilities. According to the *Interpretive Guidance*, civilians lose their protection against direct attack only for the “duration of each specific act amounting to [DPH],” which includes measures preparatory to the execution of the act, “as well as the deployment to and the return from the location of its execution.”¹⁸⁹ When civilians cease to directly participate in hostilities, they regain their status as civilians and are protected against direct attack (the so-called

"revolving door" of civilian protection). The only exception to this rule is that civilians who assume a CCF as members of an organized armed group belonging to a non-State party to the conflict lose their protected status for as long as they remain members of the group.

D. Problems with the ICRC Approach

The ICRC guidelines concerning the "revolving door" of civilian protection and the application of the CCF are problematic, at best, and appear to be biased against modern military forces, particularly when applied in the UAS context. To illustrate: under the "revolving door" of civilian protection, if an Afghan baker leaves his shop with an improvised explosive device (IED), places it on the side of the road, detonates it when a convoy drives by, killing five coalition soldiers, then safely returns to his home without being detected, the baker can no longer be directly targeted, because he has regained his protected status as a civilian (assuming of course that he has not assumed a CCF). This "baker by day, terrorist by night" can be apprehended and prosecuted for his criminal acts, but he is no longer considered to be directly participating in hostilities and is not subject to direct attack.

Application of the ICRC guidelines to individuals involved in the use of IEDs against coalition forces also produces anomalous results. The ICRC maintains that a person who purchases and smuggles components for an IED and the person who assembles and stores the IED in a workshop do not cause direct harm and are, therefore, not directly participating in hostilities and may not be directly targeted. According to the ICRC, only the person planting or detonating the IED meets the requirement of direct causation for the purposes of direct participation in hostilities. Purchasing, smuggling, assembling and storing an IED that is later used in an attack against coalition forces are not considered by the ICRC to be "integral parts of a concrete and coordinated tactical operation."

Compare the ICRC's "integral part" analysis to the use of drones. The ICRC considers all the following individuals to be directly participating in hostilities and therefore subject to direct attack:

- the individual who loads the missile on a drone that is used to conduct a strike against terrorist targets;
- the individual who launches (or recovers) the UAS, even though control of the drone is transferred to uniformed combat forces when it arrives on station;
- the computer specialist who operates the UAS through remote control;
- the operator collecting intelligence data;
- the individual illuminating the target;

- the specialist controlling the firing of the missile;
- the radio operator transmitting orders to fire the missile; and
- the overall mission commander.

While acknowledging that only a few of these individuals carry out activities that, in isolation, could be said to directly cause the required threshold of harm, the ICRC interprets the standard of direct causation more broadly in the UAS context to include conduct that causes harm in conjunction with other acts. In other words, even if a specific act does not on its own directly cause the required threshold of harm, “the requirement of direct causation would still be fulfilled where the act constitutes an integral part of a concrete and coordinated tactical operation that directly causes such harm.”¹⁹⁰

It is clear from these examples that the *Interpretive Guidance* guidelines are internally inconsistent and provide greater protection for terrorists and insurgents than they do for civilians and civilian contractors accompanying the force. It is inconceivable that the ICRC does not consider the purchasing, smuggling of components, assembling or storing of an IED that is later used in an attack on coalition forces to be an “integral part of a concrete and coordinated tactical operation,” thereby fulfilling the requirement of direct causation/harm. Yet, the ICRC would say that a contractor loading a missile on a UAS that is later dropped on a terrorist target is directly participating in hostilities because the act of loading the missile is an integral part of a concrete and coordinated tactical operation that directly causes harm to the enemy. Such a conclusion is absurd and completely ignores the fact that IED attacks “are the No. 1 killer of US troops in Afghanistan” and “more than half of American combat deaths [in 2008] were the result of IED” attacks.¹⁹¹

The ICRC is supposed to act as a neutral and independent humanitarian organization to protect innocent civilians and promote and work for a better understanding of IHL; its job is not to level the playing field between opposing belligerents. Unfortunately, in the case of DPH the ICRC has lost its impartiality by attempting to penalize the use of civilian contractors and high-tech unmanned systems, while at the same time providing additional protection to supporters of terrorist groups like al-Qaeda.

E. The Israeli Approach

The Israeli Supreme Court has taken a different, yet similar, approach to DPH. In the *Public Committee against Torture in Israel v. Government of Israel* decision, the Court determined that a civilian is considered to have taken part in hostilities when

- using weapons in an armed conflict, while gathering intelligence or while preparing himself/herself for the hostilities;

- acting as a voluntary human shield;
- sending a person to commit a hostile act, directing the hostile act and planning a hostile act; or
- joining a terrorist organization and committing a chain of hostilities, with short periods of rest between them.¹⁹²

The Court additionally determined that lethal force could only be used against a civilian that is considered to have taken a direct part in hostilities if the following criteria were satisfied:¹⁹³

- well-based information is needed before categorizing a civilian as directly participating in hostilities;
- a civilian taking a direct part in hostilities cannot be attacked if a less harmful means can be employed (e.g., arrest) unless such means involve a risk so great to the lives of the soldiers that they are not required or harm to nearby innocent civilians might be greater than that caused by refraining from using lesser means; and
- after an attack on a civilian suspected of taking an active part in hostilities, a thorough, independent investigation regarding the precision of the identification of the target and the circumstances of the attack upon him is to be performed.

Although not a perfect solution, the Israeli approach is more realistic and offers sufficient safeguards to ensure protection of innocent civilians in the targeting decision.

VIII. Use of Advanced Weapons Systems

A final argument, which merits little attention, has been advanced by some opponents to the use of drones. In general, they argue that the use of advanced weapons systems in lethal operations against terrorists is illegal under international law. In response to this argument the State Department Legal Adviser correctly noted that "the rules that govern targeting do not turn on the type of weapon system used, and there is no prohibition under the laws of war on the use of technologically advanced weapons systems in armed conflict . . . so long as they are employed in conformity with applicable laws of war."¹⁹⁴ In this regard, DoD regulations require that all acquisition and procurement of DoD weapons and weapon systems be consistent with all applicable domestic law, treaties and international agreements, customary international law and the law of armed conflict. To ensure compliance with international law and US treaty obligations, all intended acquisitions of weapons and weapons systems are subject to a legal review by a DoD attorney authorized to conduct such reviews.¹⁹⁵ Drones have been determined to be consistent with all US

treaty obligations and international law. A similar requirement applies to non-lethal weapons. Each military service is required to conduct a legal review of the acquisition of all non-lethal weapons to ensure consistency with US treaty obligations, customary international law and, in particular, the laws of war.¹⁹⁶

IX. Conclusion

The position being advocated by human rights advocates and the opponents to the use of drones is a position of weakness that, if adopted by the Obama administration, will provide al-Qaeda and its affiliates with a substantial advantage in their war of aggression against the United States and its allies. J. Cofer Black, the State Department Coordinator for Counterterrorism, got it right when he testified before the House Subcommittee on International Terrorism, Nonproliferation and Human Rights in 2004:

No country is safe from the scourge of terrorism. No country is immune from attack, and neither policies of deterrence nor accommodation will ward off attack. Al-Qaeda seeks only death and chaos, which is why we will continue to pursue the only viable course of action before us, which is to destroy this enemy utterly, both with the cooperation of our allies and by unilateral action when necessary. . . . This is definitely a long-term fight. This is a war. . . . [W]hile we have made substantial progress toward eradicating the threat posed by al-Qaeda, we are on a long, tough road. We cannot afford to falter. . . . [I]n counterterrorism . . . weakness is exploited, and it must not be shown.¹⁹⁷

Mr. Black's testimony is equally applicable today. The United States must continue to attack al-Qaeda and its affiliates wherever they may be found in order to achieve victory in this protracted war. In the short term, the use of UAS appears to be the best (if not the only) viable option to target terrorists operating from the remote areas of the FATA, Yemen, Somalia and other places. As Harold Koh emphasized, al-Qaeda continues to pose an imminent threat to the United States and the terrorist organization

has not abandoned its intent to attack the United States, and indeed continues to attack us. . . . [Accordingly,] the United States has the authority under international law, and the responsibility to its citizens, to use force, including lethal force, to defend itself, including by targeting persons such as high-level al-Qaeda leaders who are planning attacks.¹⁹⁸

If you've seen the movie *Patton* you will recall General Patton's address to the Third Army on the eve of the D-Day invasion in 1944, which begins with his

famous quip: "I want you to remember that no bastard ever won a war by dying for his country. He won it by making the other poor dumb bastard die for his country."¹⁹⁹ Opponents to the use of drones argue that US forces must first warn or attempt to capture suspected terrorists before they are engaged with lethal force, even if the terrorists are operating out of remote and inaccessible areas like the FATA. This "capture first" mentality violates the first tenet of Patton's clever remark by turning a blind eye to reality—such a limitation on the use of force in an armed conflict will provide greater protection for suspected terrorists and will inevitably result in large numbers of US casualties. Fortunately, Presidents Bush and Obama chose the Patton alternative—providing al-Qaeda terrorists the opportunity to die for their cause. Accordingly the United States will continue to use UAS to attack enemy belligerents, including al-Qaeda operatives, consistent with the inherent right of self-defense and the laws of war.

Notes

1. US GOVERNMENT ACCOUNTABILITY OFFICE, NO. GAO-09-175, UNMANNED AIRCRAFT SYSTEMS: ADDITIONAL ACTIONS NEEDED TO IMPROVE MANAGEMENT AND INTEGRATION OF DOD EFFORTS TO SUPPORT WARFIGHTER NEEDS 7 (2008), *available at* <http://www.gao.gov/products/GAO-09-175>.

2. *Rise of the Drones: Unmanned Systems and the Future of War: Hearing Before the Subcomm. on National Security and Foreign Affairs of the H. Comm. on Oversight and Government Reform*, 111th Cong. 11 (2010) (statement of John F. Tierney, Chairman, *available at* <https://hsdl.org/?view&doc=120460&coll=limited>) [hereinafter *Rise of the Drones*].

3. *Id.* (statement of Dyke D. Weatherington, Deputy Director, Unmanned Warfare, Office of the Under Secretary of Defense (Acquisition, Technology & Logistics), *available at* http://www.fas.org/irp/congress/2010_hr/032310weatherington.pdf).

4. Anna Mulrine, *UAV Pilots*, AIRFORCE-MAGAZINE.COM (Jan. 2009), <http://www.airforce-magazine.com/MagazineArchive/Pages/2009/January%202009/0109UAV.aspx>.

5. *Rise of the Drones*, Statement of Chairman Tierney, *supra* note 2.

6. Dan Murphy, *Obama ups Pakistan drone strikes in assassination campaign*, GLOBAL NEWS BLOG (Feb. 2, 2010), <http://www.csmonitor.com/World/Global-News/2010/0202/Obama-ups-Pakistan-drone-strikes-in-assassination-campaign>.

7. *Id.*

8. Adam Entous, *Special Report: How the White House Learned to Love the Drone*, REUTERS.COM (May 18, 2010), <http://www.reuters.com/article/idUSTRE64H5SL20100518>. See also Wikipedia, *Drone attacks in Pakistan*, http://en.wikipedia.org/wiki/Drone_attacks_in_Pakistan (last visited July 27, 2010).

9. Andrew Scutro, *U.S. CNO: Use of Drones Raises Legal Questions*, DEFENSENEWS.COM (Nov. 2, 2009), <http://www.defensenews.com/story.php?i=4356043>.

10. Harold Hongju Koh, Legal Adviser, US Department of State, Remarks at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), <http://www.state.gov/s/l/releases/remarks/139119.htm>.

11. Mary Ellen O'Connell, *When Is a War Not a War? The Myth of the Global War on Terror*, 12 ILSA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 4 (2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=893822##.

12. Prosecutor v. Tadić, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-I, ¶ 70 (Int'l Crim. Trib. for the former Yugoslavia Oct. 2, 1995), available at <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>.

13. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 1(2), June 8, 1977, 1125 U.N.T.S. 609, reprinted in THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 711 (Dietrich Schindler & Jiri Toman eds., 4th ed. 2004) [hereinafter AP II].

14. Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004–2009*, at 15 (Notre Dame Law School Legal Studies Research Paper No. 09-43, 2010), available at <http://ssrn.com/abstract=1501144>.

15. *Id.*

16. S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

17. *Id.*

18. See *Collective Defence*, NATO.INT, http://www.nato.int/cps/en/SID-05DFBDA5-8B11FC93/natolive/topics_59378.htm (last visited July 27, 2010). Article 5 provides:

The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

Text of Washington Treaty available at http://www.nato.int/cps/en/natolive/official_texts_17120.htm.

19. OAS Resolution RC.24/RES.1/01, Terrorist Threat to the Americas, OEA/Ser.F/II.24, RC.24/RES.1/01 (Sept. 21, 2001), available at <http://www.oas.org/OASpage/crisis/RC.24e.htm>. Article 3(1) of the Rio Treaty provides:

The High Contracting Parties agree that an armed attack by any State against an American State shall be considered as an attack against all the American States and, consequently, each one of the said Contracting Parties undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations.

Text of Rio Treaty available at <http://www.state.gov/p/wha/rls/70681.htm>.

20. *Id.*

21. Pub. L. No. 107-40, 115 Stat. 224 (2001), codified at 50 U.S.C. § 1541 note (Supp.V2005).

22. Rise of the Drones, *supra* note 2 (statement of David W. Glazier, Professor of Law, Loyola Law School Los Angeles, available at http://www.fas.org/irp/congress/2010_hr/042810glazier.pdf) [hereinafter Glazier statement]; Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Hamdan v. Rumsfeld, 548 U.S. 557 (2006); The White House, National Security Strategy (May 2010), available at http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.

23. Glazier statement, *supra* note 22, at 2.

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157. O'Connell, *supra* note 121.

158. O'Connell, *supra* note 94; O'Connell, *supra* note 140.

159. New America Foundation Study, *supra* note 144; Bergen & Tiedemann, *supra* note 45, at 5.

160. Loyd, *supra* note 141.

161. Entous, *supra* note 8.

162. AP I, *supra* note 70, art. 51(2).

163. *Id.*, arts. 44(3), 48.

164. O'Connell, *supra* note 94.

165. Anderson statement, *supra* note 123, at 3; O'Connell statement, *supra* note 98, at 1–2.

166. Rise of the Drones, *supra* note 2 (statement of Edward Barrett, Director of Research, Stockdale Center for Ethical Leadership, U.S. Naval Academy at 2, available at <https://hsdl.org/?view&doc=120460&coll=limited>); accord Glazier statement, *supra* note 22, at 3.

167. See Hague Regulations, *supra* note 131, art. 27; Convention No. IX Concerning Bombardment by Naval Forces in Time of War art. 5, Oct. 18, 1907, 36 Stat. 2351, 1 Bevans 681, reprinted in THE LAWS OF ARMED CONFLICTS, *supra* note 13, at 1080; Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 21,

Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31, *reprinted in id.* at 461; Convention Relative to the Protection of Civilian Persons in Time of War art. 28, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, *reprinted in id.* at 580 [hereinafter GC IV]; AP II, *supra* note 13, art. 13.

168. Etzioni, *supra* note 99, at 67.

169. Koh, *supra* note 10.

170. AP I, *supra* note 70, art. 51(8) (“Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57.”).

171. Koh, *supra* note 10.

172. Hague Regulations, *supra* note 131, art. 13; GC III, *supra* note 70, art. 4A(4).

173. AP II, *supra* note 70, art. 50(1) provides that “[a] civilian is any person who does not belong to one of the categories of persons referred to in Article 4A(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol.” *Id.*, art. 51(2).

174. GC IV, *supra* note 167, art. 27.

175. Federal Activities Inventory Reform Act of 1998, Pub. L. No. 105-270, 112 Stat. 2382 (1998); Office of Mgmt. & Budget, Circular No. A-76: Performance of Commercial Activities, Aug. 4, 1983 (revised 1999), *available at* <http://www.whitehouse.gov/omb/circulars/a076/a076.html>; Deputy Secretary of Defense, Department of Defense Directive 1100.4, Guidance for Manpower Management ¶ 3.2.3 (Feb. 12, 2005); Under Secretary of Defense for Personnel and Readiness, Department of Defense Instruction 1100.22, Policy and Procedures for Determining Workforce Mix ¶ 4.c, encl. 4 ¶ 1.c (Apr. 12, 2010) [hereinafter DoDI 1100.22]; Under Secretary of Defense for Acquisition, Technology and Logistics, Department of Defense Directive 3020.41, Contractor Personnel Authorized to Accompany the U.S. Armed Forces ¶ 6.1.5 (Oct. 3, 2005).

176. DoDI 1100.22, *supra* note 175, encl. 4 ¶ 1.c.

177. *Id.*

178. O’Connell, *supra* note 94; O’Connell, *supra* note 11, at 12–13, 22, 24.

179. Glazier statement, *supra* note 22, at 5.

180. Study on Targeted Killings, *supra* note 114, ¶¶ 70–71.

181. *Id.*, ¶ 72.

182. Anderson statement, *supra* note 123, at 9.

183. Study on Targeted Killings, *supra* note 114, ¶¶ 60, 64.

184. O’Connell statement, *supra* note 98, at 5.

185. NILS MELZER, INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009), *available at* [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report_res/\\$File/direct-participation-guidance-2009-icrc.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report_res/$File/direct-participation-guidance-2009-icrc.pdf). The document is not legally binding, but it does provide the ICRC’s official recommendations on how IHL relating to the notion of DPH should be interpreted in contemporary armed conflict. The US government is reviewing the document and has not yet taken an official position on whether it agrees or disagrees with the ICRC’s recommendations.

186. *Id.* at 20.

187. *Id.* at 27.

188. *Id.* at 46.

189. *Id.* at 65.

190. *Id.* at 54.

191. Jim Michaels, *IED Beam Could Change Face of War*, USA TODAY, June 7, 2010, at 8A, *available at* http://www.usatoday.com/printedition/news/20100607/ieds07_st.art.htm; James

Dao & Andrew W. Lehren, *Grim Milestone: 1,000 Americans Dead*, NYTIMES.COM (May 18, 2010), <http://www.nytimes.com/2010/05/19/us/19dead.html?th&emc=th>.

192. Public Committee against Torture in Israel v. Government of Israel ¶¶ 33, 36, 37, 39, HCJ 769/02, Judgment (Dec. 13, 2006), 46 INTERNATIONAL LEGAL MATERIALS 373 (2007), *available at* http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf.

193. *Id.*, ¶ 40.

194. Koh, *supra* note 10.

195. Deputy Secretary of Defense, Department of Defense Directive 5000.01, The Defense Acquisition System ¶ E1.1.15 (May 12, 2003).

196. Deputy Secretary of Defense, Department of Defense Directive 3000.3, Policy for Non-Lethal Weapons ¶ 5.6.2 (July 9, 1996).

197. Black statement, *supra* note 46, at 14, 20–21.

198. Koh, *supra* note 10.

199. Opening speech from the movie *Patton*, transcript available at <http://www.historyinfilm.com/patton/speech.htm>.

X

New Technology and the Law of Armed Conflict

Darren M. Stewart*

Technological Meteorites and Legal Dinosaurs?

The tacit contract of combat throughout the ages has always assumed a basic equality of moral risk: kill or be killed. Accordingly violence in war avails itself of the legitimacy of self-defence. But this contract is void when one side begins killing with impunity.¹

Introduction

The issue of new technology and its implications for the law of armed conflict (LOAC) is not a new question. For centuries nations and their militaries have had to respond to developments in the means and methods of warfare. These have ranged from hardware developments, such as the crossbow and gunpowder, to the development of tactics, such as asymmetric warfare or doctrines like the effects-based approach to operations (EBAO). In response to each of these challenges, belligerents have either developed enhanced weapons or tactics, or suffered defeat. Usually technological change has been of a relatively minor, evolutionary

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nature, affording localized tactical or operational advantage. Occasionally developments have been profound, changing the strategic balance in the favor of one side over the other. History provides examples of these in the form of the crossbow, gunpowder and nuclear weapons in the case of hardware. Similarly the Greek hoplite phalanx, the Roman legion and the development of the corps structure by Napoleon are all examples of innovations which have shaped tactics.

The question frequently posed today is whether the current nature of developments in military technology constitutes a similarly seismic shift in the military paradigm. Will the development of unmanned systems in the land, air and maritime environments be recorded in history in the same revolutionary terms as those previously mentioned? This article will consider this question in the context of the implications that flow from these developments for LOAC.

Over the centuries LOAC, in its various guises, has always had as its focus the regulation of armed conflict so as to protect the victims of war.² During the nineteenth century, in response to both the development of military technology and the prevailing social mores of the time, LOAC rules started to become formalized and began to reflect the format that we are familiar with today.

One of the notable features of LOAC has been its evolutionary flexibility. This flexibility has allowed LOAC to evolve in a manner that adapts to the developments in both technological capabilities (means) and tactics (methods) employed in armed conflict. This has included specific measures to ban weapons³ and tactics⁴ when seen as appropriate. More important, LOAC has demonstrated its flexibility through the defining principles underpinning its operation. These principles—military necessity, humanity, distinction and proportionality—are of an enduring quality and provide a benchmark against which developments in technology and tactics can be assessed as to their lawfulness. When applied in the context of prevailing international mores, LOAC proves itself both flexible and responsive to changes in the armed conflict paradigm.

The changing character of weapons systems and their impact on the law is neither one-dimensional nor negative. In fact, technological advances in weaponry frequently work to *enhance* application of LOAC, particularly in the areas of distinction and proportionality. Challenges usually arise when such developments raise wider questions as to what are the acceptable ethical limits in the application of technology to military purposes. In this context LOAC, operating as a system regulating what is inherently a human activity within a prevailing set of international mores, becomes an important consideration.

This article will consider whether the changing character of weapons systems, particularly unmanned systems and vehicles, is such as to call into question LOAC's ability to respond to the introduction of new technology onto the

battlefield. In considering this question, the paper addresses three aspects: current developments in technology, the impacts on LOAC standards arising from new technology and the implications for accountability.

Part I will consider current developments in military technology, including unmanned systems that are either remotely controlled, have automated elements to their operation or can act in an autonomous manner. What are the military drivers in the development of such technology? Do developments in artificial intelligence constitute a turning point in technology such as to warrant a bespoke response from the law? What then of the existing legal framework for the assessment of new weapons for their lawfulness as articulated by Article 36 of Additional Protocol I (AP I)?⁵ These questions will all be addressed in Part I.

The impact of new technology in armed conflict brings with it, even under the extant legal paradigm, an obligation on belligerents to apply the rules such that applicable standards of behavior may be at variance between those who possess new technology and those that don't. Whether this calls for a change in the law to acknowledge common but differentiated responsibilities⁶ or simply a renewed interpretation of what the applicable LOAC standards are will be considered in Part II.

Of course the question of standards in turn raises the issues of accountability and the means by which set standards are to be measured. Does the law of unintended consequences mean that the changing nature of weapons systems will result in an increased level of attention and scrutiny applied to senior levels of the chain of command as the only "humans in the loop"? Have States, by removing humans from the operation of weapons systems, created a whole new set of implications for accountability? Part III looks at whether civilian leaders and military commanders, in their quest to employ newer and better technology, have considered the consequences of placing themselves more squarely in the focus for breaches of LOAC when these (as they invariably will) occur.

Finally, the article will conclude by addressing whether LOAC has been able to adequately respond to the challenge of the changing character of weapons or if a fundamental root-and-branch reassessment is required.

Part I. Current Developments in Technology: Unmanned Systems and Unmanned Vehicles

Definitions

The combination of technology and military jargon can be a dangerous distraction in the context of terminology and precision in its use. This article will therefore use terminology in line with that the United States has developed in its FY2009–2034 Unmanned Systems Integrated Roadmap (hereinafter referred to as

the Roadmap).⁷ The Roadmap contains a multitude of acronyms used in this area, which are usefully consolidated at Annex H to the document.

It should come as no surprise that the accepted term that applies generically to all vehicles and systems that are either remotely controlled, automated or exhibit a degree of autonomy is “unmanned vehicle systems” (UVS).⁸ UVS are broken down by environment: land (unmanned ground vehicles (UGVs)), maritime (unmanned maritime systems (UMS)) and air (unmanned air systems (UASs)).

UGVs are those that are either armed (ground combat vehicles (GCVs)) or unarmed. UMS include unmanned undersea vehicles (UUVs) and unmanned surface vehicles (USVs). UASs include unmanned air vehicles (UAVs), tactical unmanned air vehicles (TUAVs) and unmanned combat air vehicles. Some commentators break UASs into three broad categories: TUAVs, stealth UAVs and agile or expendable UAVs,⁹ however, this structure has not received widespread endorsement. There have been some attempts by NATO Systems Concepts and Integrations panels to seek standardization in this area, including terminology; however, this is yet to produce a definitive guide.¹⁰

Equal in importance to the requirement that terminology used with respect to new technology is of a uniform nature is the requirement to understand the wider military context in which new technology is employed.

Military Doctrine as a Driver for the Development of New Technology

While the development of terminology in relation to new military technology is relatively straightforward, what is less so is the drivers for its development and use. The desire to develop a decisive hardware advantage over an opponent is but one of these. As military doctrine evolves in relation to the employment of unmanned systems, technology is seen as a key enabler rather than a panacea to the challenges posed by the paradigm of the contemporary operating environment. The manner in which technology is used by the military is therefore critical. As Air Commodore Julian Stinton puts it:

[L]etting the thinking drive the technology could lead to more coherence in approach and more commonality in capabilities under an overall concept, but less potential for exploitation of novel game-changing technologies. This is the steady, analytical, non-ephemeral approach, requiring just as much technological capability in information management, prioritisation, automation, pattern seeking, relational activity using staring arrays, change detection, wide-area scanning and cueing, as the adrenalin[e]-laden, higher-buzz technological demands of real-time ISR.¹¹

For those in the military, this will, of course, be an obvious statement; however, the benefits derived from recent developments in new military technology have

been distorted by a perception that the quest for newer and better technology is virtually an “end in itself,” rather than being one of a number of “means to an end.” Air Chief Marshal Sir Brian Burridge describes the challenge in somewhat blunter terms:

Those who are lured by expensive technologies without a deeper understanding of how to use them, task them and integrate them will be left with empty pockets and shiny toys—the “esoteric chimera” I referred to earlier. Those that understand their limitations, benefits and the most important of all, the human dimension, will be left with a little more money to spend elsewhere and an essential capability that they can use effectively.¹²

With the widespread introduction of EBAO by Western militaries into their operational doctrine, the use of new technology has become but one (albeit sophisticated) component of an increasingly integrated, multifaceted campaign plan. As such, new military technology cannot be simply viewed as an upward trending graph of enhancement in capabilities. It is the manner in which the myriad capabilities afforded by new technology are employed by commanders and their staffs that is becoming the decisive factor in differentiating opponents and, as a consequence, their ability to prevail in armed conflict.

Advocates for the employment of automated or even autonomous systems argue that the phenomenon of information overload, which is prevalent on the modern battlefield, underscores the requirement for systems that can process information and make decisions far more efficiently than humans. Such an approach fails to consider two important elements. First, the processing of information into intelligence requires a broad array of skills, including intuitive, experience-based analysis and cognitive functions of which automated or autonomous systems are incapable. Second, and perhaps most important, is the fact that the battlefield is a complex system of interlinked actions, each of which may impact differently on an opponent depending on the context in which it occurs, and which will not have the same effect each time. It is the management of this complex network, seeking to influence the effect actions have in a coordinated manner toward a certain set of campaign objectives, that is at the heart of effects-based operations. As such:

To the extent that it works, the place of the human in the system seems to have changed dramatically. The important judgement is now made at a data fusion or intelligence centre—or, alternatively, by a forward observer aware of how dynamics of a battle have made a particular target temporarily important.¹³

Thus, the use of new technology in this context, while enabling greater efficiencies and providing potentially decisive effect, does so within a wider campaign construct that requires the exercise of clear human direction and control.

Types of New and Evolving Technology

Broadly speaking, UVS operating types fit into three categories. First are those that are remotely controlled, also known as tele-operated, where an operator will control the UVS by some form of direct radio signal (line of sight or satellite). The operator can be either relatively close, such as in the same operational theater, or many thousands of miles away as in the case of Predator/Reaper operations in Afghanistan.¹⁴

The second category is automated UVS, meaning that functions are carried out within preprogrammed parameters without the requirement for a command from a human. There are many examples of this type of UVS currently employed by militaries around the world. For example, Global Hawk is a UAS, most of whose flight commands are controlled by onboard systems without recourse to a human operator. Similarly in the land environment, automated sentry systems that respond to movement in, or breaches of, security perimeters are often used in relation to minefields or other installations, and provide an automated response without human intervention. In the maritime context, the close-in weapons systems used to defend surface warships from anti-ship missile attack are, due to the speed of response required to defeat the threat, largely automated.

Finally, work is being carried out to develop autonomous systems for military application that incorporate forms of artificial intelligence, allowing the UVS to operate independently of humans and carry out all of the functions that otherwise would have involved human action.

Perhaps the best single official source of data on the types and employment of UVS is the US Roadmap.¹⁵ Not only does it contain an analysis of future requirements (including detailed descriptions of individual system characteristics) for the US military (the largest single user and developer of UVS), but it places these requirements within an operational context focusing on the how and why of UVS employment. The investment in terms of resources and effort by the United States in developing new UVS technology is impressive; the funding for this project alone over a five-year period (2009–13) is projected to be a staggering \$18.9 billion.¹⁶ This commitment to the development and use of UVS is underscored by the 2001 US congressional mandate that one-third of military aircraft and ground combat vehicles be unmanned by 2015.¹⁷ The size and scope of the US unmanned systems program bring into sharp focus the impact such new technology has, and will continue to have, on US military capability. Other nations can ill afford to ignore such

a development. Professor Jack Beard paints the US fascination with technology in a rather more somber light:

The U.S. military-technological experience represents a consistent, but exaggerated, variation of the historical trends in this area, as Americans have displayed an almost boundless confidence in the power of science and technology to promote “progress” and have tended to trust in the power of military technology to translate into success in war.¹⁸

It is not possible to list the myriad of types and names of systems that are being developed or will become spin-offs of the programs covered by the US unmanned systems program. The table below illustrates the number and types of UVS that the United States assesses as having a force application capability (i.e., capable of offensive action). These systems span the ubiquitous Predator and Reaper UAVs to GCVs and the newly developed littoral combat ship (LCS). The LCS is the latest addition to the US Navy and is designed to operate on a modular basis with several unmanned systems loaded on board, including the Remote Mine Hunting System and MQ-8B Fire Scout Vertical Takeoff Unmanned Air Vehicle.

Table 1 Named Unmanned Systems Associated with Force Application ¹⁹	
Air-to-Air UAS	WMD Aerial Collection System (WACS)
Automated Combat SAR Decoys	Autonomous Expeditionary Support Platform (AESP)
Automated Combat SAR Recovery	Contaminated Remains/Casualty Evacuation & Recovery
Combat Medic UAS for Resupply & Evacuation	Crowd Control System (Non-lethal Gladiator Follow-on)
EOD UAS	Defender
Floating Mine Neutralization UAS	Intelligent Mobile Mine System
High Altitude Persistent/Endurance UAS	Next Generation Small Armed UGV
High Speed UAS	Nuclear Forensics Next Generation UGV
Micro Air Vehicle (MAV)	Small Armed UGV Advanced
MQ-1	Small Unmanned Ground Vehicle (SUGV)
MQ-9 Reaper	UAS-UGV Teaming
Next Generation Bomber UAS	Amphibious UGV/USV

Table 1
Named Unmanned Systems Associated with Force Application (continued)

Off Board Sensing UAS	Autonomous Undersea Mine Layer
Precision Acquisition and Weaponized System (PAWS)	Bottom UUV Localization System (BULS)
SEAD/DEAD UAS	Harbor Security USV
Small Armed UAS	Hull UUV Localization System (HULS)
STUAS/Tier II	Mine Neutralization System
Unmanned Combat Aircraft System– Demonstration (UCAS-D)	Next Generation USV with Unmanned Surface Influence Sweep System (USV w/US3)
Vertical Take-off and Landing Tactical Unmanned Air Vehicle (VTUAV Firescout)	Remote Minehunting System (RMS)
WARRIOR A/I-GNAT	SUSV with Unmanned Surface Influence Sweep System (USV w/US3)
Weapon borne Bomb Damage Information UAS	VSW UUV Search, Classify, Map, Identify, Neutralize (SCMI-N)

To illustrate that not all developments have focused on offensive capability, the table below illustrates that an even greater number of UVS are being developed that are associated with protection capabilities. These systems include harbor security UASs, explosive ordnance disposal (EOD) UASs and battlefield casualty extraction robots designed to reduce risk to military medics by carrying out the traditional stretcher-bearer function.

Table 2
Named Unmanned Systems Associated with Protection²⁰

Automated Combat SAR Decoys	MK 3 MOD 0 RONS
Automated Combat SAR Recovery	MK 4 MOD 0 Robot, EOD
Combat Medic UAS for Resupply & Evacuation	Mobile Detection Assessment Response System (MDARS)
EOD UAS	Multi-function Utility/Logistics and Equipment (MULE) ARV Assault Light (ARV-A(L))
MQ-1	Multi-function Utility/Logistics and Equipment (MULE) Countermines (MULE-C)

Table 2
Named Unmanned Systems Associated with Protection (continued)

MQ-5B Hunter	Multi-function Utility/Logistics and Equipment (MULE) Transport (MULE-T)
RQ-7 Shadow	Next Advanced EOD Robot
STUAS/Tier II	Next Generation Maritime Interdiction Operations UGV
Unmanned Combat Aircraft System–Demonstration (UCAS-D)	Next Generation Small Armed UGV
Vertical Take-off and Landing Tactical Unmanned Air Vehicle (VTUAV Firescout)	Nuclear Forensics Next Generation UGV
WARRIOR A/I-GNAT	PackBot Explorer
Advanced EOD Robot System (AEODRS)	PackBot FIDO
All Purpose Remote Transport System (ARTS)	PackBot Scout
Anti-Personnel Mine Clearing System, Remote Control (MV-4B)	Route Runner
Automated Aircraft Decontamination	Small Armed UGV Advanced
Automated Bare Base/Shelter Construction UGV	Talon Eng/3B
Automated Facilities Services	Talon EOD
Autonomous CASEVAC & Enroute Care System (ACES)	Talon IV
Autonomous Expeditionary Support Platform (AESP)	UAS-UGV Teaming
Battlefield Casualty Extraction Robot (BCER)	xBot (PackBot Fastac)
CBRN Unmanned Ground Vehicle Advanced	Autonomous Undersea Mine Neutralization
CBRN Unmanned Ground Vehicle Advanced Concept Technology Demonstration	Bottom UUV Localization System (BULS)
Combat Engineering & Support Robotic System	Harbor Security USV

Table 2
Named Unmanned Systems Associated with Protection (continued)

Contaminated Remains/Casualty Evacuation & Recovery	Hull UUV Localization System (HULS)
Crowd Control System (Non-lethal Gladiator Follow-on)	Mine Neutralization System
Defender	Next Generation Surface-launched Mine Counter-Measures Unmanned Undersea Vehicle (SMCM UUV)
F6A-ANDROS	Next Generation USV with Unmanned Surface Influence Sweep System (USV w/US3)
HD-1	Remote Minehunting System (RMS)
MARCBot	SEAFOX USV
Maritime Interdiction Operations UGV	Surface-launched Mine Counter-Measures Unmanned Undersea Vehicle (SMCM UUV)
Mine Area Clearance Equipment (MACE)	USV with Unmanned Surface Influence Sweep System (USV w/US3)
MK 1 MOD 0 Robot, EOD	VSW UUV Search, Classify, Map, Identify, Neutralize (SCMI-N)
MK 2 MOD 0 Robot, EOD	

Other nations have not been idle in the face of the incredible pace of UVS development and the unprecedented resource allocation that the United States has committed to the task. Both the United Kingdom and Israel have long been pioneers in UVS development, albeit in slightly different areas. In response to the Irish Republican Army terrorist threat in the second half of the twentieth century, which regularly manifested itself through either remotely detonated or time-delayed improvised explosive devices, the United Kingdom pioneered the development of a remotely operated EOD capability. Similarly, it was Israeli application of UAS capability in the Bekaa Valley in Lebanon in the 1970s that showed the potential for the future development of such systems.²¹

However, development in these countries has not been restricted solely to these types of systems. The United Kingdom is actively developing its capability in TUAVs, with the early prototype Phoenix TUAV having been replaced by both the Hermes 450 TUAV and Desert Hawk (a handheld TUAV).²² Further development

of the Watchkeeper TUAV will see the capability for automated takeoff and landing being deployed.²³ In addition, the United Kingdom has invested in developing longer-range stealth UAS with offensive strike capability as part of the Taranis project, as well as in developing other offensive strike capability in the form of loitering munitions²⁴ and cruise missiles such as Brimstone.²⁵

In addition to its vibrant UAS industry, Israel has also developed capabilities in the land environment with point-defense systems, such as the Guardium System, which illustrates increasingly enhanced and sophisticated levels of automation.²⁶ South Korea has developed a similar concept with its Samsung Techwin SGR-A1 Sentry Guard Robot²⁷ designed to perform surveillance and sentry duties of minefields along the Korean Demilitarized Zone. China is also widely assumed to be developing UVS technology following the unveiling of the Anjian (Invisible Sword) prototype pilotless combat aircraft by the China Aviation Industry Corporation I at the sixth International Aviation and Aerospace Exhibition held in Zhuhai, in October 2006.²⁸

As one would expect when technology develops at such a rate, there are also prototypes that suggest either bizarre or incredible future developments. These include the suggestion of using implants in crickets to aid in the detection of the presence of either explosive chemicals or carbon dioxide emissions in order to detect explosives and humans, respectively.²⁹ Other prototypes include LAPCAD Engineering's FOOT vehicle, the Fly Out of Trouble jet-engine-powered supercar, and the aquatic robot named Ghost Swimmer that mimics the propulsion drive of a bluefin tuna.³⁰ While these developments may seem incredible to many, other previously dismissed systems such as FIST (Fully Integrated Soldier Technology), which consists of a combination of special e-textiles, exoskeletons and nanotech armor, are being developed beyond mere prototype sketches into credible programs by defense research agencies such as the US Defense Advanced Research Projects Agency (DARPA). Indeed, such are the advances in nanotechnology that a prototype ultramicro UAV called the Maple Seed Flyer is being developed by Lockheed Martin as a means of providing persistent ISR stealth capability.³¹

Legal Consequences of New Technology

While much of the new technology discussed in the preceding section is of an automated or semiautonomous nature, the area giving rise to the greatest controversy, including legal consequences, is that of autonomous systems. These are UVS programmed to act independently of human control. A leading proponent of this technology is Professor Ron Arkin of the Georgia Institute of Technology.³² Arkin's hypothesis is that not only can robots that are programmed with an ethical code outperform humans in terms of their ability to process complex, fast-moving

scenarios, but they will consistently behave in a manner that is *more* humane. This is not merely the zealous utterance of an extreme fringe of the unmanned system development community. Arkin has been commissioned by DARPA to conduct a study on the feasibility of his hypothesis and whether it, in fact, has any military application. In relation to his research for DARPA Arkin states: “This effort has an over-arching goal of producing an ‘artificial conscience,’ to yield a new class of robots termed *humane-oids*—robots that can perform more ethically in the battlefield than humans are capable of doing.”³³

Clearly the suggestion of robots performing tasks, including offensive operations, without recourse to human controllers raises not only legal, but considerable ethical questions. Support for these systems, of course, presumes that programming code can be produced that will allow robots to act in accordance with LOAC—a matter that is yet to be determined. However, the mere claim that robots can act in accordance with LOAC does not test the difficult, if not problematic, question of operating UVS in armed conflict, where the fog of war creates ambiguity and unpredictability beyond the imagination of even the most gifted programmer.

These concerns have not gone unnoticed by States in their analyses of the development and employment of this type of technology. The US Roadmap states:

Because the DoD complies with the Law of Armed Conflict, there are many issues requiring resolution associated with employment of weapons by an unmanned system. For a significant period into the future, the decision to pull the trigger or launch a missile from an unmanned system will not be fully automated, but it will remain under the full control of a human operator. Many aspects of the firing sequence will be fully automated but the decision to fire will not likely be fully automated until legal, rules of engagement, and safety concerns have all been thoroughly examined and resolved.³⁴

One could add that the “significant period into the future” referred to will also include an element of the international community becoming familiar with, and unconcerned about, the operation of such UVS, assuming, of course, that the technology will develop in such a way as to satisfy all the operating criteria of the military. This may well mean that for the foreseeable future we will continue to see human control being exercised over UVS, even where these systems may have the capability of operating independently of human control. The United States Air Force Unmanned Aircraft Systems Flight Plan 2009–2047,³⁵ essentially a single-service plan to implement the strategic guidance provided in the Roadmap, clearly anticipates the existence of this continued human control when it makes the following assumption: “Agile, redundant, interoperable and robust command and control (C2) creates the capability of supervisory control (‘man *on the loop*’) of UAS.”³⁶

The questions to be resolved by policymakers in the military application of UVS are set out in the Air Force's UAS Flight Plan as follows:

Authorizing a machine to make lethal combat decisions is contingent upon political and military leaders resolving legal and ethical questions. These include the appropriateness of machines having this ability, under what circumstances it should be employed, where responsibility for mistakes lies and what limitations should be placed upon the autonomy of such systems. . . . Ethical discussions and policy decisions must take place in the near term in order to guide the development of future UAS capabilities, rather than allowing the development to take its own path apart from this critical guidance.³⁷

Quite apart from the ethical questions posed by the employment of autonomous systems, perhaps the most overt extension of the application of UVS technology, there remain real concerns as to the ability of such weapons to comply with LOAC. The autonomous system's ability to distinguish a military objective from a protected person or object, and its ability to weigh the proportionality test in a holistic manner,³⁸ is yet to be adequately addressed. The question of accountability for the actions of autonomous systems also cries out for an answer and will be addressed in Part III.

The quest to develop the newest, best and most capable military technology (the Holy Grail of decisive effect) can often result in the relegation to the backseat of considerations as to whether such technology is not only needed but, indeed in a broader perspective, even *desirable*.

Existing Legal Control Mechanisms

As military technology development continues to progress at an unrelenting pace as States strive to achieve the next level of technological advantage over one another, how does the law cope with these new developments and seek to regulate them? AP I is clear in articulating those types of methods (including weapons) that are prohibited in armed conflict.³⁹ Indeed, the prohibitions contained in Article 35(2) are relatively non-contentious, representing as they do the customary law on the subject.⁴⁰ Similarly, the provisions of Article 36⁴¹ have been accepted, even by States who are not parties to AP I, as either reflective of best practice or as an obligation flowing from the customary law norm articulated by Article 35(2)—although it is by no means as clear that Article 36 has the status of customary law. Not that Article 36 is particularly controversial in its terms, which require States to determine the lawfulness of new weapons and means and methods of warfare. Rather, it is in the *obligation* to comply with its operation that disparate State practice seems to have developed. As Professor Jacobsson observes, "Unfortunately, very few

States undertake such an examination before employing new means and methods of warfare, despite the fact that the obligation relates to the initial stages, i.e., the 'study' and 'development' of a new weapon."⁴²

Proving Professor Jacobsson's assertion empirically is problematic, given that even those States, such as the United States, that have sophisticated weapons testing programs do not publish the results of their analyses. The very nature of certain new UVS technology will mean that not all States will even have the *capacity* to conduct adequate testing were they to acquire the technology. Notwithstanding this, it can be assumed that those States that do possess the wherewithal to develop new technology should also have the concomitant ability to carry out the necessary analysis required by Article 36. Of course, given that it is arguable whether Article 36 is declaratory of customary law, those States not party to AP I are under no specific obligation to comply with its provisions. However, as the sole purpose of the Article 36 requirement to assess LOAC compliance of new weapon systems prior to introduction relates to customary law obligations as codified in Article 35, it would appear *a fortiori* that best practice suggests a State would be prudent to ensure that it is not in breach of its LOAC obligations by assessing the introduction of new weapons systems. Evidence of this approach can be seen in the existence of what is probably the most sophisticated assessment process for the introduction of new weapons carried out by a State—and this by a country that is not a State party to AP I, namely, the United States.

It is another matter, however, whether the output from these reviews should be published. This is certainly not current State practice, notwithstanding the fact that there have been calls from a number of differing organizations for greater transparency in the review of new weapon systems. These have ranged from representatives of States⁴³ to human rights institutions.⁴⁴ These arguments include questions of confidence measures in relation to international arms sales and exports in the case of States, or the characteristics of weapons systems and their effect on civilian populations in the case of human rights activists. What is consistent is the argument that there is a public right to know that the State that oversaw the development of the new technology giving rise to the production of a new weapon system correctly assessed its impact for LOAC compliance.

This debate aside, it is clear that if the law is to keep pace with technological developments, then it is through the weapons review process that the initial fitness-for-use test in LOAC terms can be established. While the requirement to carry out the test, whether as a binding legal obligation or as an exemplar of best practice, would appear to be entirely consistent with an approach illustrating the law's ability to keep pace with new technology, the concerns raised by an increasing number of interested parties within the international community over whether such reviews are

actually conducted would seem to give rise to justifiable concerns that this important component of LOAC application is not being given the effect it should have.

The existence of new military technology, possessing capabilities far beyond those anticipated when the LOAC paradigm was first formally constructed in the nineteenth century, has resulted in calls that LOAC is no longer “fit for purpose” in fulfilling the role of regulating armed conflict and, in particular, providing protection to those it is designed to protect. Increasing levels of weapon system automation, coupled with claims that robots can behave “more humanely” than humans, create an uncomfortable juxtaposition of concepts leading to further reflection as to LOAC’s suitability in its current guise. These calls fail to address the fact that, in part, LOAC does provide a framework to address these issues. In many senses it is the failure of States to apply the principles of AP I’s Articles 35 and 36 in a consistent manner that results in a perception of new technology being allowed to proceed without any form of checks and balances.

It is clear that in theory, if not in practice, adequate control mechanisms do exist to ensure LOAC compliance during the development and procurement phases. It is, however, appropriate to consider whether the changing character of weapons systems has had the effect of altering the applicable LOAC standards in terms of their employment. Part II will consider this question and whether calls for the development of LOAC to respond are warranted.

Part II. Impacts on LOAC Standards Arising from New Technology

The enhanced capabilities brought about through the development and employment of the new technologies referred to in the preceding part bring with them not only the ability to achieve decisive effect on the battlefield but an unprecedented ability to give effect to the application of LOAC. The changing character of weapons means that militaries possessing the relevant capability can not only target with unprecedented precision but, in addition, through the use of sophisticated persistent surveillance, assess with much greater accuracy the anticipated effects of incidental loss or damage to civilian persons or property and take appropriate remedial measures. The cumulative effect of this has been to enable, in certain circumstances, the achievement of much enhanced levels of protection for civilians by those nations employing such technology.

It is important to note the qualification “certain circumstances” in the preceding paragraph. Notwithstanding the aspiration to be able to conduct targeting in an environment that is as controlled as possible, both the nature of armed conflict and in particular the confused and often ambiguous environment of land operations mean that the conditions necessary to fully exploit the capabilities that new

technology offers commanders and their staff are frequently not met. This is a particularly challenging scenario in conflicts of a non-international character, where the blurring of the lines between civilian and military is a commonplace occurrence.

What effect, then, has the changing character of weapons had on the standards to be applied by States who possess the types of advanced technology of which UVS are an example? Have technological advances resulted in the effect of Article 57 of AP I changing?⁴⁵

Some academics,⁴⁶ and indeed State practice,⁴⁷ suggest that the requirement to take all feasible precautions in attack to minimize incidental loss of life to civilians and damage to civilian objects should be seen in the context of a subjective analysis based on capabilities available to the relevant commander. This will mean that where a commander's technological capabilities exceed those of his opponent, a higher standard in relation to precautions in attack will apply. There are, however, those who would argue that an entirely new legal standard is now possible and that LOAC should be amended so as to speak to the question of common but differentiated responsibilities.⁴⁸

Common but Differentiated Responsibilities

Professor Gabriella Blum argues that by comparing LOAC to international trade law or environmental law, parallels can be drawn between those regimes where differing standards are applied to countries that have greater means than to those who do not. Or otherwise put:

While the equal application of the law has formally endured in [international humanitarian law], as in most spheres of international law, regulation has taken a different path in some areas of international law—most notably, international environment law (“IEL”) and international trade law (“ITL”)—by linking obligations with capabilities. This linkage has been accomplished in several ways: by defining obligations with reference to resources (such as ordering compliance by developed parties “to the fullest extent possible”), exempting weaker parties from compliance with certain obligations altogether, and even ordering more powerful parties to extend material assistance to weaker ones. Taken together, these provisions have been termed Common but Differentiated Responsibilities (“CDRs”)⁴⁹

Taken in the context of new technology, the concept of CDRs, applied in a minimalist sense, would support the extant requirement under LOAC for a State who possesses the technical capability to be obliged to consider its use as part of taking all feasible precautions in attack. In extremis, the CDR approach might well oblige States to share technology, where to do so would improve the overall level of protection afforded to the civilian population. Of course, the phenomena, often

characterized by new technology, of enhanced precision and distinction are motivated more by military considerations than necessarily the ability to minimize incidental loss, which is a welcomed spin-off. In such circumstances the obligation to share technology as part of some form of CDR may well prove problematic, even counterproductive to the development of the types of new technology that enable greater LOAC compliance. Nor is there a positive obligation under LOAC for States to develop and employ new technology possessing such characteristics.⁵⁰

Therefore, CDRs that go beyond the current LOAC construct would require either a basis in treaty or some form of development in the customary law. Neither would seem to be likely in the short to medium term, nor does there appear to be any need for this. The current LOAC principle of proportionality coupled with the requirement to take all feasible precautions in attack would appear to be perfectly adequate not only in recognizing the differing means available to parties to a conflict, but in also requiring that higher standards be observed by those parties who can. The term “all feasible precautions” provides sufficient flexibility to address the relative disparities in capabilities between belligerents. As such, it can adequately accommodate the application of both extant and new technology.

To create a structure that seeks to codify a set of CDRs in LOAC not only is unnecessary, but would be quite impossible to achieve—impossible in the context of being able to adequately define such CDRs under treaty law (to an extent that provides any form of meaningful advance on the extant LOAC) and impossible in that State practice sufficient to point to such a development in customary law would be as elusive as the proverbial pot of gold at the end of a rainbow. Which State with the relevant capability is likely to conduct itself in a manner so as to create such practice?

Professor Mike Schmitt underscores this fact in his reference to the existence of a state of normative relativism:

[A]s the technological gap widens, the precautions in attack requirements operate on the belligerents in an increasingly disparate manner. After all, the standards are subjective, not objective; a belligerent is only required to do what is feasible, and feasibility depends on the available technology. The result is normative relativism—the high tech belligerent is held to higher standards vis-à-vis precautions in attack than its opponent. It is, of course, normative relativism by choice because States are under no legal obligation to acquire assets that will permit them to better distinguish between military objectives and the civilian population.⁵¹

Evolution of Customary Law?

Notwithstanding Schmitt's clear statement of where the current law places differing obligations on belligerents (making the CDR approach somewhat moot), the recent International Committee of the Red Cross (ICRC) *Interpretive Guidance on*

the Notion of Direct Participation in Hostilities under International Humanitarian Law (DPH Study)⁵² suggests that the ICRC view of the customary law position in relation to the use of force might in some limited manner support the premise behind CDRs. At chapter IX of the DPH Study the ICRC sets out its position on the permissible levels of force that may be used by parties to a conflict to achieve a military objective. It argues that technology can be determinative in defining the military necessity context within which particular levels of force are used. Indeed the DPH Study anticipates technology playing a limiting role where it provides the capability to achieve effect with the use of lower levels of violence.

The DPH Study is not without its critics, particularly with respect to the position it takes in articulating the existing law in chapter IX. Much of the criticism focuses on what is perceived as a conflation of a law enforcement paradigm governing the use of force under human rights law with the approach under LOAC, ignoring the accepted principle of *lex specialis*.⁵³ While it is not the place of this article to engage in a detailed debate of the DPH Study (the author would not be as critical as some commentators of the position articulated by the ICRC in chapter IX and finds much in the remainder of the study to commend it), it is conceivable that the DPH Study might be used to develop arguments in support of a CDR approach. Whether this is the intent of the DPH Study or not, there is a need to consider the consequences of such arguments on LOAC, particularly with reference to proportionality and precautions in attack. This is not a debate that impacts purely on questions of distinction and therefore is of questionable value in forming part of a discrete study on direct participation in hostilities.

Any consideration of the impact of new technology on LOAC standards runs the risk of being seduced by the same scenario that creates exaggerated perceptions of what new technology can deliver in terms of effect on the battlefield. Such a perception drives the argument that the law has failed to keep pace with change, is therefore redundant and requires change. However, such an approach fails to acknowledge the operation of LOAC as a flexible system in which the latest technological advances can be adequately accommodated without the need for root-and-branch change to the law. Professor Christopher Greenwood, writing in 1998, identified this quality as the key strength of LOAC:

The flexibility of the general principles thus makes them of broader application than the specific provisions which are all too easily overtaken by new technology. If the speed of change in military technology continues into the next century (as seems almost inevitable), that capacity to adapt is going to be ever more important.⁵⁴

Greenwood's assertion is, of course, predicated upon the assumption that the pace of technological development will make specific attempts to regulate particular developments either susceptible to redundancy, or reflective of a piecemeal attempt to ban individual weapons.⁵⁵ When one couples the AP I requirement to assess the implementation of new technology for the purposes of LOAC compliance in conjunction with the extant customary law obligations to assess proportionality and take all feasible precautions in attack, it is hard not to agree with Greenwood when he states:

In this writer's opinion, it is both more probable and more desirable that the law will develop in this evolutionary way than by any radical change. With the law of weaponry, as with most of the law of armed conflict, the most important humanitarian gain would come not from the adoption of new law but the effective implementation of the law that we have. That should be the priority for the next century.⁵⁶

If one accepts that the extant LOAC paradigm is adequate in addressing issues arising from both the development and employment of new technology, then it is right to consider whether the final part of the LOAC system—accountability—is similarly well placed to cope. Part III will consider the changing character of weapons and whether the LOAC accountability paradigm can adequately address the issues that arise from new technology.

Part III. Implications for Accountability

When considering new technology and its military application, any analysis will invariably turn to the question of accountability. While mechanization of the battlefield is neither new, nor something the international law dealing with criminal responsibility is unaccustomed to addressing, the potential for autonomous weapon systems to effectively remove the human, either from the loop or even on the loop, poses challenges.

Remotely Controlled and Automated Systems

The question of accountability in the case of tele- or remotely operated vehicles is relatively straightforward. An operator controls the device and as a consequence the actions of that device can be attributed to that operator, or indeed to his/her commander in the context of directing action that constitutes a breach of LOAC or where the commander fails to act to either prevent or punish LOAC breaches.

Similarly, even automated systems will generally be employed within either a context that is controlled by humans, directing the vehicle to a particular task, or

one in which humans can intervene in the event that the device were to act outside its mission or the permitted LOAC paradigm. The premise underpinning automation is that the operation of the relevant device is capable of being accurately predicted based on the programming and commands inputted.

Barring deviant behavior, on behalf of either the computer programmer or operator, it can be assumed that the vehicle will generally act within the permitted legal framework. Of course malfunction can never be excluded, nor can the consequences of ambiguity on the battlefield. However, there is generally sufficient nexus of control or operation in the cases of both remotely operated and automated vehicles such that the international criminal law can attribute accountability for culpable behavior in cases of LOAC violations.

Autonomous Systems

This equation becomes much more problematic in the case of autonomous systems. The very nature of autonomous systems implies that they have an artificial intelligence capable of analyzing information, determining a course of action based on this analysis and then executing that response, all without the intervention of a human operator. The operation of the autonomous device creates considerable challenges for the would-be LOAC violation prosecutor in terms of establishing the relevant nexus of culpable behavior by a human such as to give rise to criminal liability. The tele-operator of remotely controlled vehicles or even the command programmer for automated equipment can both be seen as having direct roles in determining the actions of the devices they control. They are capable of direct responsibility, even if that control is exercised at distance—sometimes a considerable one.⁵⁷

This cannot be said of those involved with autonomous systems. Neither the programming nor the command data inputted to these vehicles prior to their deployment on a particular operation will necessarily result in a specific outcome in response to any given set of circumstances; this is the essence of autonomy. Absent the aberrant behavior of either the data or command programmers, which would be considered in the same context as for remotely or automated vehicles, it would be almost impossible to attribute the autonomous system's behavior *directly* to a particular human. That is not to say autonomous vehicles are incapable of LOAC breaches. Indeed, even the most ardent supporters of autonomous systems do not argue that breaches can be completely removed, just that autonomous systems can perform better (including more ethically) than humans.⁵⁸

The notion of accountability is of course a uniquely human one. Under any system of law the commission of a crime (such as a breach of LOAC) should give rise to an investigation and where sufficient evidence exists, the prosecution of the

alleged perpetrator. What happens then when the perpetrator is incapable of being prosecuted because it is a machine? Other than reprogramming or scrapping equipment there is little point in carrying out a futile exercise of finding the relevant piece of equipment guilty of a LOAC breach. Such a scenario offends not only the notion of the rule of law, but also the more visceral human desire to find an individual accountable. Given this, it would appear highly unlikely that a breach of LOAC by an autonomous system is something that would go without some degree of human accountability. Indeed there is a strong argument that States should not be able to employ such systems and rely upon the relative impunity with which their operations might be conducted in the event that the question of accountability fails to be resolved.

States and Commanders in the Dock

There are, of course, two alternative means of accountability: State responsibility under human rights mechanisms and command responsibility.

To take these in order: The extent to which States will be held responsible for what might constitute a human rights violation that is equally one under LOAC will depend on not only the character of the conflict concerned,⁵⁹ but also the respective State obligations under international human rights law. This will produce significantly disparate effects in terms of sanctions, e.g., in the case of States who are parties to the European Convention on Human Rights as compared to that of those States who have obligations under the International Covenant on Civil and Political Rights alone. This is largely due to the enforcement mechanisms in place in relation to each of these treaty structures. While this difference may well have an impact on the formal aspects of enforcement (e.g., court rulings and pecuniary awards against States in the case of the former), one cannot avoid the implications for States that flow from judgments of courts like the European Court of Human Rights and Inter-American Court of Human Rights, or bodies such as the United Nations Human Rights Council. Such pronouncements, influencing as they do in the age of mass communication the court of public opinion, may well have a determining effect on the preparedness of States to employ autonomous systems ahead of the creation of any corresponding permissive environment, whether this be political or social.

Perhaps one of the unintended consequences of the development of autonomous weapons systems is the potential that they may have to focus greater attention on civilian leadership and military commanders at the operational or strategic level for the actions of autonomous systems. It is useful here to remind oneself that the increased levels of sophistication and complexity that new technology introduces to the battlefield are part of a systemic approach to leveraging technology to

achieve decisive effect. As such, any future employment of autonomous systems must be seen in this context. It would be naïve, therefore, to think of circumstances where a commander would allow the deployment of autonomous weapon systems in a manner where their operation was not in accordance with his or her particular campaign design and where the purpose behind the use of these systems would not be to achieve consistent, predictable effect.

Given the unpalatable outcome of alleged breaches of LOAC going unpunished, it is far more likely that in the future the concept of command responsibility under international criminal law will be seen as an appropriate recourse for attributing accountability for LOAC breaches by autonomous systems. The arguably lower threshold test in terms of culpability for command responsibility contained within the Rome Statute,⁶⁰ requiring merely that a commander “should have known” of the possibility of the alleged breach of LOAC, places in sharp focus a commander’s potential liability. This is particularly the case in circumstances where the removal of subordinates in the command chain results in fewer individuals who might otherwise be accorded the substantial responsibility for LOAC breaches.

It remains to be seen whether this increased risk is a “real” one or whether it is no different than that which exists in cases where such systems are not employed. It is, however, a consequence that has received little, if any, attention from legal advisers in armed forces. It is certainly deserving of greater consideration. Such attention should focus not only on the technical aspects of attributing responsibility based on the requisite elements of offenses being satisfied, but on the broader public policy issues associated with the possibility of military operations being conducted in a “blameless environment.”

Conclusion

In one sense, the changing characters of weapons and armed conflict, seen in the specific context of unmanned vehicles and systems, represent nothing more than the natural evolution of technology in its application to the battlefield. However, in other respects the introduction of new technology creates challenges for the application of LOAC, if only in the sense that what is unusual or different is often seen as complex and difficult.

This article posed the question of whether the changing character of weapon systems, including unmanned systems and vehicles, is such as to question the ability of LOAC to adequately cope with the introduction of new technology to the battlefield.

Fundamental to this question is the consideration of new technology in the context within which it is to be employed. New technology often has a symbiotic

relationship with the evolution of new tactics and stratagems. The capabilities it brings to the battlefield have aided in shaping new approaches to the practice of the “art of war.” It is important to remind oneself in this respect that the tail should not be wagging the dog. Enhanced capability and new hardware, bewildering as they are in the scope and reach of their effects, should be seen as means to an end, not ends in themselves.

Just as military doctrine has demonstrated its flexibility in coping with the relentless development and introduction of new technology, LOAC has provided—and will continue to provide—a framework for the regulation of armed conflict. Calls to create new standards or to interpret the law in ways that seek to regulate the unknown, or at least the not yet known, do not stand up against an assessment of what LOAC provides in terms of a system of law that regulates not just the introduction of new technology, but also its application.

Useful processes, such as those forming part of the AP I Article 36 weapons review, seem purpose designed not only to act as initial control valves to ensure that military methods and means can advance in a coherent and effective manner but also to act as red flags to possible LOAC issues associated with the employment of new technology. It is unfortunate that too few States engage actively in the weapons review process, an area where greater effort to comply with the law should occur.

Generally the existing LOAC rules would seem sufficiently flexible to adapt to the deployment of new technology on the battlefield. In many respects new technology has greatly aided the application of LOAC and contributed to an *increase* in the protection of civilians. In this sense, the story is a good news one. The extant LOAC paradigm has responded in a flexible manner, benefiting from the positive synergies afforded by technological advances. The virtue of such a system, however, comes with compliance rather than the creation of new standards or responsibilities, such as CDRs, or use of the capabilities afforded by new technology to argue that a human rights paradigm is more appropriate. Armed conflict continues to be an unpredictable, often base affair, where significant ambiguity prevails, notwithstanding the employment of considerable technological capability. The benefits afforded by new technology in such circumstances are significant if they can ameliorate even some of the suffering caused by armed conflict, but they are by no means a panacea.

New technology creates its own challenges in the context of accountability, particularly with respect to autonomous systems. The perverse effect for States and the senior civilian and military command echelon who promote the development and implementation of new technology as a means of “casualty free” warfare is that they may well find themselves with nobody to stand between the actions of such autonomous systems and themselves when things go wrong. It is hoped that the

associated discomfiture from this realization may well act in a positive capacity to focus minds as to the need for such new technology, and manner in which it is employed.

Consider the mutually assured destruction scenario, which hung over the world during the Cold War and led to the notion that nuclear weapons should be treated as a “special case.” This was largely due to the nature of such weapons, dehumanizing war and giving rise to massive destruction on a wide-scale basis. Autonomous weapons systems as an example of the changing character of weapons may not involve such destruction; indeed one of the consequences of their use is that it avoids such a scenario. However, an increasing reliance upon technology clearly has the potential to dehumanize armed conflict, creating a perception of low or no risk and, in doing so, possibly convincing States of the viability of the recourse to the use of force to resolve disputes.

In the face of this, LOAC continues to offer a balanced, civilizing effect as part of a system of law providing a broad regulatory framework intended to afford protection to the most vulnerable. In this context, flexibility (of course coupled with compliance) is its greatest strength. Whether the current developments in technology will constitute a “watershed” or defining moment in the evolution of warfare remains to be seen. What is clear is that LOAC is capable of keeping pace and continuing to meet its mission of protection and humanity.

Notes

1. MICHAEL IGNATIEFF, *VIRTUAL WAR: KOSOVO AND BEYOND* 161 (2000).
2. United Kingdom Ministry of Defence, *The Manual of the Law of Armed Conflict* ¶ 1.8 (2004) [hereinafter UK LOAC Manual].
3. *Id.*, ¶ 6.1.4.
4. See *id.* at 66–80 for an analysis of prohibited methods of warfare.
5. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].
6. Gabriella Blum, *On a Differential Law of War*, 52 HARVARD INTERNATIONAL LAW JOURNAL 163 (2011).
7. Office of the Secretary of Defense, Department of Defense, FY2009–2034 Unmanned Systems Integrated Roadmap (2d ed. 2009), available at <http://www.acq.osd.mil/psa/docs/UMSIntegratedRoadmap2009.pdf> [hereinafter DoD/OSD Roadmap].
8. *Id.*, Annex H, at 193.
9. Michael Franklin, *Unmanned Combat Air Vehicles: Opportunities for the Guided Weapons Industry?*, Sept. 2008, available at http://www.rusi.org/downloads/assets/Unmanned_Combat_Air_Vehicles.pdf.
10. *Id.* at 3.
11. Julian Stinton, *The ‘Find’ Function – An Airman’s Personal View*, RUSI DEFENCE SYSTEMS, Feb. 2009, at 57, 59.

12. Brian Burrridge, *Post-Modern Warfighting with Unmanned Vehicle Systems – Esoteric Chimera or Essential Capability?*, RUSI JOURNAL, Oct. 2005, at 20.
13. Norman Friedman, *UCAVs: A New Kind of Air Power?*, RUSI DEFENCE SYSTEMS, June 2010, at 62, 63.
14. Franklin, *supra* note 9, at 3 (the UAV operators are located at Creech Air Force Base, Indian Springs, Nevada).
15. DoD/OSD Roadmap, *supra* note 7.
16. *Id.* at 4, Table 1.
17. Jack M. Beard, *Law and War in the Virtual Era*, 103 AMERICAN JOURNAL OF INTERNATIONAL LAW 409, 413 (2009), available at [http://www.law.georgetown.edu/faculty/userfiles/file/foreign%20relations%20law%20colloquium/Beard_first_proofs_\(7-13-09\).pdf](http://www.law.georgetown.edu/faculty/userfiles/file/foreign%20relations%20law%20colloquium/Beard_first_proofs_(7-13-09).pdf).
18. *Id.* at 411.
19. DoD/OSD Roadmap, *supra* note 7, at 10, Table 4.
20. *Id.* at 11–12, Table 5.
21. Burrridge, *supra* note 12, at 20.
22. Claire Button, *Unmanned Aerial Vehicles on Operations: Overcoming the Challenges*, RUSI DEFENCE SYSTEMS, June 2009, at 76.
23. *Id.* at 77.
24. Simon Deakin, *Joint Fires – The Challenges to Come*, RUSI DEFENCE SYSTEMS, Feb. 2010, at 82, 84. Loitering munitions are small cruise missiles that can be launched and left to “loiter” or “stack” for calling forward and being designated on target when it appears.
25. For a discussion of Brimstone’s capabilities, see *Libya: RAF Unleashes Hellfire and Brimstone*, DEFENSEMANAGEMENT.COM (Mar. 10, 2011), http://www.defencemanagement.com/feature_story.asp?id=16132.
26. James Masey, *From Pack Mules to Fighting Scouts*, RUSI DEFENCE SYSTEMS, Oct. 2007, at 40, 41.
27. *Samsung Techwin SGR-A1 Sentry Guard Robot*, <http://www.globalsecurity.org/military/world/rok/sgr-a1.htm> (last visited Sept. 10, 2010).
28. A concept model of a pilotless combat aircraft was unveiled by China Aviation Industry Corporation I (CAIC1) during the 6th International Aviation and Aerospace Exhibition held in Zhuhai on China’s southern coast. The aircraft, dubbed “Anjian” (Invisible Sword), is being designed by CAIC1’s Shenyang Aeroplane Design Institution for future aerial combat according to an introduction by CAIC1. *Invisible Sword: China’s Pilotless Aircraft*, CHINA VIEW, http://news.xinhuanet.com/english/2006-10/31/content_5270824.htm (last visited Sept. 5, 2010).
29. *Pentagon Cyborg-insect Program Could Save Quake Victims*, CAFESENTIDO.COM (July 14, 2009), <http://www.casavaria.com/cafesentido/2009/07/14/3579/pentagon-cyborg-insect-program-could-save-quake-victims/>.
30. *Boston Engineering’s Ghost Swimmer SUV Spotted in the Wild*, MASSHIGHTECH.COM (Aug. 24, 2009), <http://www.masshightech.com/blog/tag/boston-engineering/>.
31. *Nano Air Vehicle*, LOCKHEEDMARTIN.COM, <http://www.lockheedmartin.com/products/nano-air-vehicle.html> (last visited Sept. 5, 2010).
32. Professor Ron Arkin is the Director of the Mobile Robot Laboratory, Georgia Institute of Technology, Atlanta, Georgia.
33. RONALD C. ARKIN, GOVERNING LETHAL BEHAVIOR IN AUTONOMOUS ROBOTS 16 (2009).
34. DoD/OSD Roadmap, *supra* note 7, at 10.
35. Headquarters, United States Air Force, United States Air Force Unmanned Aircraft Systems Flight Plan 2009–2047 (May 18, 2009).

36. *Id.* at 14.

37. *Id.* at 41.

38. That is, other than to simply attempt to predict the expected number of casualties and then determine engagement on the basis of whether the number is less than or exceeds a given programmed benchmark.

39. AP I, *supra* note 5, art. 35 (Basic rules):

1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.
2. It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.
3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.

40. Cf. AP I, *id.*, art. 35(3). The United States, United Kingdom and France are to varying degrees persistent objectors to the adoption of this principle as a norm of customary IHL.

41. *Id.*, art. 36 (New weapons):

In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.

42. Marie Jacobsson, *Modern Weaponry and Warfare: The Application of Article 36 of Additional Protocol I by Governments*, in *THE LAW OF WAR IN THE 21ST CENTURY: WEAPONRY AND THE USE OF FORCE* 184 (Anthony M. Helm ed., 2006) (Vol. 82, US Naval War College International Law Studies).

43. *Id.* at 189. Jacobsson states the aspiration that “[t]here are a number of critical issues that need to be addressed at an international level. . . . [G]iven the obligation imposed on all States to evaluate the legality of the weapons used, it is reasonable to discuss the matter in a multilateral context.”

44. Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, Human Rights Council, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>. In it, Alston addresses the questions of transparency and accountability. *Id.*, ¶¶ 87–92.

Although the report focused on the use of drones in the context of targeted killings, Alston’s comments on transparency would appear to have much wider implications for the introduction of new technology. In paragraph 89 he refers to not only an obligation to take steps to consider the effects of weapons to be used but an obligation for States to disclose such procedural safeguards. Reference is made to the *HPCR Commentary* in support of this assertion. HARVARD PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, COMMENTARY ON THE HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE rule 32(c) (2009), available at <http://ihlresearch.org/amw/Commentary%20on%20the%20HPCR%20Manual.pdf>.

While the *Commentary* articulates the requirements for precautions in attack, it does not support the contention that procedural safeguards taken by States to give effect to this obligation are required to be disclosed. There is little evidence to support Alston’s assertion. As a consequence it must be viewed as an aspiration similar to that articulated by Jacobsson, *supra* note 42.

45. AP I, *supra* note 5, art. 57 (Precautions in attack) provides as follows:

1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.
2. With respect to attacks, the following precautions shall be taken:
 - (a) those who plan or decide upon an attack shall:
 - (i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;
 - (ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;
 - (iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;
 - (b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;
 - (c) effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.
3. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.
4. In the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.
5. No provision of this article may be construed as authorizing any attacks against the civilian population, civilians or civilian objects.

46. Michael N. Schmitt, *War, Technology and the Law of Armed Conflict*, in *THE LAW OF WAR IN THE 21ST CENTURY*, *supra* note 42, at 137.

47. UK LOAC Manual, *supra* note 2, at 85. The Manual supports this contention by stating that in assessing whether a decisionmaker has discharged his responsibilities in terms of precautions in attack, “[t]his means looking at the situation as it appeared to the individual at the time when he made his decision.” When taken in conjunction with the factors listed at page 83, which include the weapons available, it is clear that UK State practice requires a subjective judgment on behalf of a decisionmaker taking into account any enhanced technological advantage in weapons he may possess. There is no obligation to use such weapons; however, the fact that they were available will *count* toward whether the decisionmaker took all *feasible* precautions.

48. See, e.g., Blum, *supra* note 6.

49. *Id.*

50. YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 126–27 (2004).

51. Schmitt, *supra* note 46, at 163.

52. NILS MELZER, INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 77–82 (2009).

53. W. Hays Parks, *Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect*, 42 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 769, 797–99, available at http://www.law.nyu.edu/ecm_dlv2/groups/public/@nyu_law_website__journals__journal_of_international_law_and_politics/documents/documents/ecm_pro_065930.pdf.

54. Christopher Greenwood, *The Law of Weaponry at the Start of the New Millennium*, in THE LAW OF ARMED CONFLICT: INTO THE NEXT MILLENNIUM 185, 221 (Michael N. Schmitt & Leslie C. Green eds., 1998) (Vol. 71, US Naval War College International Law Studies).

55. E.g., the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 2056 U.N.T.S. 211 and the Convention on Cluster Munitions, Dec. 3, 2008, 48 International Legal Materials 357 (2009).

56. Greenwood, *supra* note 54, at 222.

57. Franklin, *supra* note 9, at 3.

58. ARKIN, *supra* note 33, at 16.

59. Human rights law will continue to apply in times of armed conflict, subject to the application of the *lex specialis* rule in relation to LOAC or where States have made derogations under applicable treaties.

60. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90. Article 28 (Responsibility of commanders and other superiors) provides as follows:

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

PART VII

**THE CHANGING CHARACTER OF TACTICS:
LAWFARE IN ASYMMETRICAL CONFLICTS**

XI

The Law of Armed Conflict in Asymmetric Urban Armed Conflict

David E. Graham*

Introduction

At the conference from which this “Blue Book” is derived, I served as the moderator of a panel entitled “The Changing Character of Tactics: Lawfare in Asymmetrical Conflicts.” This reflects an apparent assumption: that tangible changes have occurred in the tactics now being used by States in waging armed conflicts of an asymmetric nature.

In offering some thoughts of my own on this subject, I turn to the pivotal questions posed to the panel. “Is this a valid assumption? And, if so, have such changes in tactics occurred within the context of the historically accepted norms of the Law of Armed Conflict (LOAC), or do these tactical modifications represent a fundamental shift in the manner in which the customary and codified LOAC is now being both interpreted and applied to these conflicts by the international community?”

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The Goldstone Report: Has There Occurred a Fundamental Interpretive Change in the Applicability of the Law of Armed Conflict to Asymmetric Urban Armed Conflict Scenarios?

There currently exists a widespread assumption that a change has occurred in the tactics now being used by States to wage asymmetric conflicts. If this is true, do these tactics, nevertheless, continue to reflect a traditional application of the LOAC to such conflicts? Or, instead, are these tactical changes being driven, in fact, by a substantial shift in the manner in which the international community has chosen to interpret the application of fundamental LOAC principles to such scenarios?

The focus will be on a very specific type of asymmetric conflict—one involving a State on the one hand and a non-State entity on the other—and, even more specifically, asymmetric armed conflict between a State and a non-State entity in essentially, if not exclusively, an urban environment. Why is the question focused so narrowly, and why do I consider this subject to be one that has recently taken on increasing importance?

Certainly, it is true that, for almost a decade, US and coalition forces have been involved in ongoing and seemingly unending conflicts increasingly waged in densely populated urban areas. Both Iraq and Afghanistan have seen extensive fighting occur in urban settings as the US and its coalition partners have confronted both State and various non-State entities in the form of the Taliban and elements of al Qaeda in these theaters of operation. In this age of “persistent conflict,” the chances are great that the United States will continue to see its forces consistently having to deal with such fighting environments. In brief, asymmetric State/non-State urban conflicts—and, importantly, all of the LOAC issues associated with such conflicts—have been a part of the international landscape for an extended period of time.

Given this reality, then, why is it that I now believe it to be an imperative that the United States and other States that may well find themselves involved in these types of conflicts fully examine the matter of whether a fundamental shift has occurred in the manner in which some of the most well established principles of the LOAC will be applied to an armed force’s future use of force against a non-State entity in an urban setting? Again, why now?

The answer to this question resides in the form of something called the Goldstone Report.¹ Many are familiar with this report. It would appear, however, that little consideration has been given to its contents in the context of the matter at hand—its potentially adverse impact on the future applicability of the LOAC to the types of conflict in issue.

The Goldstone Report, issued in September 2009, is the product of the United Nations Fact-Finding Mission on the Gaza Conflict, established, interestingly enough, by the President of the UN Human Rights Council in April 2009. Its mandate was “to investigate all violations of international human rights law and international humanitarian law that might have been committed at any time in the context of the military operations that were conducted in Gaza during the period [between] December 27, 2008 and January 18, 2009, whether before, during or after.”² The military operations being referenced were, of course, those of the Israeli Defence Force’s (IDF’s) Operation Cast Lead, taken primarily in response to mortar and rocket attacks launched against Israel by the Palestinian organization Hamas from within Gaza (some 12,000 attacks in the previous eight years).³

The four-member Goldstone mission was headed by Justice Richard Goldstone, a former judge of the Constitutional Court of South Africa and former president of the international criminal tribunals for the former Yugoslavia and Rwanda. The other three appointed members were a professor of international law at the London School of Economics and Political Science, an advocate of the Supreme Court of Pakistan, and a former officer in Ireland’s Defence Forces.⁴

From the very outset of its work, the mission stated that it would interpret its mandate as requiring that it place the civilian population of the region at the center of its concerns regarding violations of international law,⁵ an interpretive decision that was to prove to be of no small consequence, particularly from the standpoint of the appropriate applicability of LOAC. Also key to the mission’s approach was its determination that, in keeping with its mandate, it was required to consider any action that might be deemed a violation of either international human rights law or international humanitarian law⁶ (a popularized, but duplicative and misleading term said to incorporate both the customary and codified LOAC).

This latter determination is a matter of particular concern, as it serves to assert the historically controversial, and, I would submit, erroneous, contention that human rights law applies coequally with the LOAC during periods of armed conflict. That is, the assertion is that the LOAC is not *lex specialis*—that it is not that body of law that exclusively regulates the methods and means of conducting conflict. Indeed, a number of the mission’s allegations of offenses said to have been committed by the IDF are based exclusively on presumed violations of human rights law—not the LOAC.

If left unchallenged, this particular contention alone would represent a substantial shift in the potential legal obligations and responsibilities of combatants on any battlefield and in any form of conflict, and could portend, as well, a significant enhancement of the potential criminal liability of such individuals. They could now

be charged with largely undefined “human rights” violations, rather than violations of the well-established customary or codified LOAC.

Setting aside this particular issue, this attempt to conflate the LOAC with human rights law, let me turn, in more detail, to an examination of the manner in which the mission chose to apply some of the most basic provisions of the LOAC, itself. And, with an apology to those who are fully conversant with this body of law, in order to assess the mission’s “unique” application of this law to the conflict in Gaza, it is useful to review what have been long regarded as universally recognized LOAC principles/precepts binding on every State in the international community. These are:

1. “Military necessity (advantage).” This principle authorizes those use-of-force measures, not otherwise forbidden by the LOAC, required to accomplish a mission. The important caveat, here, of course, is that this principle must be applied in conjunction with the other customary LOAC principles, as well as with more specific constraints contained in the codified LOAC.
2. “Distinction/discrimination.” This principle requires that combatants be distinguished from non-combatants and that military objectives be distinguished from protected property and protected places—that is, civilian property and protected places such as cultural, medical and religious sites.
3. “Proportionality.” This principle serves as a balancing fulcrum, weighing the competing principles of “military necessity” and “distinction” when making a targeting decision. The proportionality test—“the anticipated loss of life and damage to property incidental to an attack must not be excessive in relation to the ‘concrete’ and ‘direct’ military advantage ‘expected’ to be gained”⁷—introduces the idea of a “reasonable commander” making proportionality determinations, and is akin to the “reasonable man” test. That is, would a “reasonable commander,” i.e., a commander of ordinary sense and understanding, given the facts known to him at the time, have been justified in taking the action in issue?
4. “Unnecessary suffering.” The last of the four basic customary LOAC principles requires an armed force to minimize “unnecessary suffering.” In essence, this applies to the legality of the types of weapon systems and ammunition used, as well as to the legality of the methods used to employ

such weapons and ammunition. Certain weapons/munitions are *per se* unlawful—projectiles filled with glass, lasers specifically designed to permanently blind unenhanced vision and hollow-point ammunition. For purposes of this discussion, it is also important to recall that, as noted, even lawful weapon systems can be used in an unlawful manner. That is, the use of a weapon must comport with the lawful “methods” of conducting conflict.⁸

One last point must be considered before moving to an examination of the manner in which these most fundamental principles of the LOAC were applied by the Goldstone mission to Operation Cast Lead. To what types of armed conflict does the LOAC apply? The answer to this question is found in Common Articles 2 and 3 of the 1949 Geneva Conventions.⁹

Article 2 defines international armed conflicts as “all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties [to this Convention], even if the state of war is not recognized by one of them”—that is, State-on-State conflict.

Article 3 applies the LOAC to conflicts not of an international character, defined as conflicts “not of an international character occurring in the territory of one of the High Contracting Parties [to this Convention].” That is, they are “internal conflicts”—revolutions, rebellions, insurrections—occurring within the territorial boundaries of a State, ones involving a non-State entity (insurgents) attempting to displace the constituted government of a State by force.

With this as background, let’s examine just several examples of the manner in which the Goldstone mission applied the LOAC to actions taken primarily by the IDF in Gaza. The purpose, here, will be to assess whether the mission’s determinations—and concomitant allegations of LOAC violations—do, in fact, evidence both a departure from the way in which the most basic principles of this law have historically been interpreted and a fundamental shift in the manner in which such principles will be applied in the future, particularly in the context of asymmetric State/non-State urban conflict. Also of importance is the consideration of whether these allegations represent, either implicitly or explicitly, a move toward potentially enhanced criminal liability for State participants in such conflicts and whether in turn this has effected—or is effecting—a change in the tactics used to wage these types of conflicts.

IDF Attacks against Hamas “Government” Buildings and Gazan Authorities, Specifically the Gazan Police

The government of Israel (GOI) has contended that the buildings targeted were an integral part of the Hamas “terrorist infrastructure” in that they housed those elements of Hamas engaged in directing the ongoing armed attacks against Israel and that the Gazan police were merely an arm of the Hamas military forces.¹⁰ In contrast, the Goldstone mission determined that the buildings in issue were not used in a manner that made an “effective” contribution to military action and that, accordingly, IDF attacks on these buildings constituted a deliberate attack on civilian objects in violation of the customary rule of the LOAC that requires that attacks be limited strictly to military objectives. It further concluded that such attacks had resulted in a “grave breach”—the extensive destruction of civilian property not justified by military necessity carried out both unlawfully and wantonly—of the LOAC.¹¹

With respect to the IDF attacks on Gazan police personnel, the Goldstone mission determined that, while there may have been certain elements of the Gazan police who were also members of Hamas armed groups and accordingly potential combatants, when attacked these police personnel were not taking a “direct part in hostilities” and thus had not lost their civilian immunity from direct attack. The mission further concluded that the IDF attacks on the police facilities failed to strike an acceptable balance between the direct military advantage expected to be gained, that is, the killing of those policemen who may, in fact, have been members of Hamas military groups; and the loss of civilian life, that is, those other policemen who may not have been members of such military groups, as well as members of the public who may simply have been in the vicinity of such attacks.¹²

Even a cursory assessment of the Goldstone mission’s stated reasoning regarding this matter reveals what appears to be both a misinterpretation and misapplication of the LOAC principles of military necessity, distinction and proportionality. The same can also be said of the manner in which the mission chose to apply the concept of “direct participation in hostilities” to Hamas police personnel who, by their status alone, could arguably have been targeted as combatants. Thus, to deem the IDF operational decisions in question as a “deliberate attack on civilian objects” and a “grave breach” of the LOAC reflects a deliberate intent on the part of the mission to proffer an interpretation of these LOAC concepts that departs significantly from their historical application. Left unchallenged, the mission’s findings would potentially constitute a fundamental shift in the way in which these most basic of LOAC principles will be applied in the future to all forms of conflict.

The Obligation of the IDF to Take Feasible Precautions to Protect Both the Civilian Population and Civilian Objects in Gaza

In the context of this issue, the mission focused specifically on the obligation of the IDF to provide “effective” prior warnings of its attacks undertaken in Gaza. While the mission acknowledged that significant efforts had been made by the IDF to issue such warnings—radio broadcasts, the dropping of over 2,500,000 leaflets and the making of over 165,000 phone calls to specific buildings that were to be targeted¹³—it concluded that this was not enough. In the view of the mission, such warnings were simply not effective because some of both the prerecorded phone messages and leaflets lacked the required specificity¹⁴ (absent a discussion of what such specificity might entail). And, in examining the IDF practice of firing warning shots from light weapons that hit the rooftops of designated targets in which civilians previously had been warned of an impending attack—as a final warning—it concluded that this, too, not only did not serve as an “effective” warning, but, instead, constituted an attack against civilians who chose to remain in the targeted buildings.¹⁵

Once again, the mission’s interpretation of the actions that must be taken to provide an “effective” warning to civilians of an impending attack flies in the face of the codified LOAC. Such warnings can be only general in nature. There is no requirement that they be specific as to the time and location of an attack.¹⁶ The measures taken by the IDF in issuing warnings to the civilian population within Gaza went far beyond anything legally required. The mission’s reasoning on this matter reflects an ignorance—or intentional misstatement—of the applicable law.

Attacks by the IDF Resulting in Loss of Life and Injury to Civilians

The mission examined multiple incidents involving IDF actions that resulted in civilian casualties and civilian property loss. It prefaced its legal conclusions with the recognition that, for all armies, decisions involving the concept of “proportionality”—weighing the military advantage to be gained against the risk of civilian casualties—would present genuine dilemmas. Having noted this, however, it concluded that, in applying these customary LOAC principles to every IDF action assessed, each IDF use of force, regardless of any mitigating circumstances or operational considerations that may have been involved, had been indiscriminate in nature and, in multiple cases, a deliberate, intentional attack on the civilian population and civilian infrastructure. As such, the mission contended, these attacks violated the LOAC; some were grave breaches of the Fourth Geneva Convention (the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War); and, in certain cases, they also constituted a violation of the right to life of the Palestinian civilians killed—that is, they were a violation of human rights law.¹⁷

The GOI has challenged these mission findings, setting forth, in detail, the operational considerations that were at play at the time of the incidents in issue, and assessing the actions of the IDF, in each instance, in the context of both codified and customary LOAC principles.¹⁸

A review of the information provided by the GOI would lead to the conclusion that, while individual IDF commanders might be second-guessed regarding certain targeting and weapon decisions made during the course of an ongoing operation—and some IDF mistakes were made, and acknowledged—an objective LOAC analysis of the events in issue would not result in a finding that the IDF engaged in deliberate and indiscriminate attacks against the civilian population of Gaza. In view of the information available to the Goldstone mission, its allegations of willful killings of protected persons by IDF personnel, giving rise to individual criminal responsibility, reflect a complete misinterpretation or intentional distortion of the applicable LOAC norms.

The IDF's Use of Certain Weapons

The Goldstone mission, while noting that white phosphorus¹⁹ is not proscribed under the LOAC, made the determination that the IDF was “systematically reckless” in using this substance in densely populated, built-up areas. Accordingly, it concluded that serious consideration should be given by the international community to banning its use in such settings.

The mission also focused on the IDF's use of *fléchettes*: thousands of very deadly darts generally contained in tank shells. When a shell is fired, and detonates, these darts are sprayed over a three-hundred-by-one-hundred-meter area. Given the nomenclature of this munition, the mission opined that *fléchettes* are an area weapon of an indiscriminate nature, and were, therefore, particularly unsuitable for use in urban locations where civilians are present.²⁰

These mission statements are noted in order to alert those government representatives who deal with such matters of the fact that the mission has essentially declared the use of *fléchettes* in certain operational settings as illegal *per se*. The “appropriate” use of such munitions may thus well appear on a forthcoming agenda of the International Committee of the Red Cross.

In choosing to apply the LOAC, as well as human rights law, in the manner noted above, to IDF actions taken in Operation Cast Lead, the mission concluded that the IDF had committed over thirty violations of these legal regimes, to include grave breaches of the Geneva Conventions, and that, most significantly, in doing so, the IDF had intentionally targeted both the Gazan civilian population and infrastructure. Given its findings, the mission demanded that the GOI investigate, try and punish those individuals found to be responsible for the commission of the

offenses that it had documented. This is in keeping with the concept of “complementarity,” the right of a State to investigate and, if necessary, punish members of its armed forces who have engaged in violations of the LOAC. However, of particular importance, the mission further recommended that, should the GOI be unable or unwilling to take these actions, these offenses should then be referred to the International Criminal Court (ICC) and/or made subject to the exercise of universal jurisdiction.²¹

The mission then immediately proceeded to provide its own answer to the matter of whether the GOI was, in fact, willing or able to undertake the investigatory and potential prosecutorial actions the commission deemed necessary. It made the following determination:

International human rights law and humanitarian law require states to investigate and, if appropriate, prosecute allegations of serious violations by military personnel. International law has also established that such investigations should comply with standards of impartiality, independence, promptness, and effectiveness. The mission holds that the Israeli system of investigation does not comply with all of these principles.²²

The mission also concluded that

there are serious doubts about the willingness of Israel to carry out a genuine investigation in an impartial, independent, prompt, and effective way. The mission is also of the view that the Israeli system overall presents inherently discriminatory features that make the pursuit of justice for Palestinian victims very difficult.²³

In essence, then, the mission adjudged the GOI’s application of the concept of complementarity in this particular situation and found it lacking. Such a conclusion would appear to serve as a unilateral mission determination that it was a foregone conclusion that its allegations of GOI violations of both the LOAC and human rights law would be submitted to the ICC and the exercise of universal jurisdiction.

In making such a determination, the mission evidences either an apparent failure to understand fully the requirements of complementarity or a decision to apply these requirements in such a way that even the world’s most developed military investigatory and prosecutorial systems could not meet the standards imposed.²⁴ Regardless of its motives, the mission’s cursory dismissal of GOI efforts to investigate and prosecute alleged LOAC violations occurring in the context of Operation Cast Lead as inadequate does not serve as an authoritative interpretation of the complementarity concept.

Largely unnoticed, but of substantive importance to those States which consistently engage in the types of conflicts in issue, is the fact that, since the issuance of the Goldstone Report, its contents have been endorsed in both a February 2010 UN Human Rights Council report of a special rapporteur on the “human rights situation in Palestine and other occupied Arab territories”²⁵ and most recently on April 14 in a UN Human Rights Council resolution dealing specifically with the report. Very significantly, the resolution called upon the General Assembly “to promote an urgent discussion on the future legality of the uses of certain munitions as referred to in the report of the United Nations Independent International Fact-Finding Mission on the Gaza Conflict, drawing, *inter alia*, upon the expertise of the International Committee of the Red Cross.”²⁶ These UN endorsements of such flawed legal analysis are indeed daunting.

Conclusion

In closing, and in an attempt to formulate a basis for what I believe to be a necessary discussion concerning whether the Goldstone Report reflects a fundamental shift in the manner in which some of the most basic principles of the LOAC will be applied to future asymmetric State/non-State urban armed conflict, I pose the following questions:

1. Does the manner in which these types of conflicts are characterized dictate the extent to which the LOAC applies to such military operations? In the case of Operation Cast Lead, the conflict was unique in nature. It can be argued that it was neither a Common Article 2 nor a Common Article 3 conflict; that is, it was neither international nor internal in nature. Yet, clearly, it was the view of the Goldstone mission—as well as the international community as a whole—that certain aspects of the LOAC dictated the conduct of the parties involved. Are the findings of the mission, then, to be applied in the future to all forms of conflict in which operations are conducted in an urban environment, e.g., US assaults on Taliban urban strongholds in Afghanistan? If not, in what manner are the specific aspects of the LOAC—both codified and customary—to be applied to asymmetric State/non-State urban conflict?
2. Does the Goldstone Report reflect a consensus within the international community that the LOAC is no longer the exclusive legal regime that controls the means and methods of waging conflict—that is, that certain aspects of human rights law now play a coequal role?

3. In view of the Goldstone Report, has an identifiable shift occurred in the manner in which basic LOAC principles are now to be applied to targeting decisions made in the context of urban conflict? That is, when balanced on the fulcrum of “proportionality,” does the principle of “discrimination/distinction”—the protection of the civilian population and civilian property—now disproportionately outweigh the principle of “military advantage/necessity”?
4. Are there lawful weapon systems (white phosphorus, fléchettes and cluster bomb units) that are, nevertheless, so indiscriminate in nature that, for the protection of the civilian population and civilian property, they should be barred from use in urban conflict?
5. And, as an associated question: in view of a perhaps evolving perceived need to give added weight to the protection of the civilian populace and civilian property in urban conflict, should a State that possesses precision weapons and munitions be required to use such?
6. The issue of “dual targeting”; that is, to what extent might a State target non-State entity personnel and facilities used by such personnel when they may serve both civilian and military purposes? In Gaza, for example, this would include the Gazan police, their facilities and the facilities of the Hamas leadership.
7. This issue, in turn, raises the exceptionally controversial matter of the criteria to be used in determining whether an individual associated with a non-State entity is “directly” participating in hostilities—and thus subject to being targeted.
8. The extent to, and the manner in, which a State must issue a warning to an urban civilian population at large, or to individual civilians, of a pending attack on a general area or a specific facility?
9. What are the LOAC obligations of a non-State actor, if any? How might the international community hold a non-State actor responsible for both compliance with, and violations of, these obligations?
10. How does a State cope with the intentional use of the civilian population, civilian property and protected places by a non-State entity for the purpose of gaining a military advantage?

11. What is the status to be accorded non-State combatants seized in the course of a State/non-State conflict? For what offenses might they be tried and in what type of judicial forum? All of these issues are, of course, related to any form of conflict in which “unlawful combatants” might participate.
12. And, finally, the Goldstone mission concluded that the GOI had failed to meet the international law standards required for a lawful exercise of the principle of complementarity, that right of a State to try members of its military forces for alleged violations of the LOAC. How is an assessment as to whether a State has met the requirements of complementarity to be made? And what body—or bodies—are empowered to make such a judgment, and a concomitant decision/recommendation that the alleged LOAC violations in issue be referred to the ICC or subjected to the exercise of universal jurisdiction?

As noted, these questions go to the central issue of whether the Goldstone Report evidences a growing consensus within the international community that there has occurred a fundamental shift in the manner in which some of the most basic principles of the LOAC—and, the mission would contend, human rights law as well—should be applied to asymmetric State/non-State urban conflict. And, if applicable to this form of conflict, why not to every form of conflict waged in an urban environment? Moreover, if this is, in fact, the case, does this change portend an enhanced risk of potential criminal liability for the members of a State’s armed forces who are called upon to make critical decisions in the midst of battle?

Commentators may soon begin to contend that the Goldstone Report currently “occupies the field” with regard to these issues. For those who would differ with this assessment, I would submit that the time has come for an informed discussion and a clear statement of disagreement with the Goldstone mission’s interpretation of the LOAC principles applicable to State/non-State urban asymmetric conflict.

Notes

1. U.N. Human Rights Council, *Human Rights in Palestine and Other Occupied Arab Territories, Report of the United Nations Fact Finding Mission on the Gaza Conflict*, U.N. Doc. A/HRC/12/48 (Sept. 29, 2009) (Richard Goldstone), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf> [hereinafter Goldstone Report].

2. *Id.* at 13.

3. Israel Ministry of Foreign Affairs, *The Operation in Gaza: Factual and Legal Aspects* 5 (July 29, 2009), available at http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terrorism+and+Islamic+Fundamentalism-/Operation_in_Gaza-Factual_and_Legal_Aspects.htm [hereinafter GOI White Paper].

4. See Goldstone Report, *supra* note 1, at 13. The other three appointed members were Professor Christine Chinkin, Professor of International Law, London School of Economics and Political Science; Ms. Hina Jilani, Advocate of the Supreme Court of Pakistan; and Colonel Desmond Travers, a former officer in the Irish Defence Forces.

5. *Id.*

6. See *id.* at 14.

7. DEPARTMENT OF THE ARMY, FM 27-10, THE LAW OF LAND WARFARE para. 41, change 1 (1956).

8. See INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, OPERATIONAL LAW HANDBOOK 10–13 (2010).

9. See, e.g., Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 244 (Adam Roberts & Richard Guelff eds., 3d ed. 2000).

10. See GOI White Paper, *supra* note 3, at 86–90.

11. See Goldstone Report, *supra* note 1, at 17.

12. *Id.* at 18.

13. See GOI White Paper, *supra* note 3, at 99–100.

14. See Goldstone Report, *supra* note 1, at 18.

15. *Id.* at 19.

16. Regulations Respecting the Laws and Customs of War on Land, annexed to Hague Convention No. IV Respecting the Laws and Customs of War on Land art. 26, Oct. 18, 1907, 36 Stat. 2227, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 9, at 69.

17. See Goldstone Report, *supra* note 1, at 20.

18. See GOI White Paper, *supra* note 3, at 117–50.

19. White phosphorus is a toxic chemical agent that burns violently when exposed to air. Incendiary munitions containing white phosphorus can be used for marking and range finding. Its use in non-incendiary munitions, however, is generally for the purpose of illuminating an area or producing a thick white smoke that can mask troop movements. The phosphorus powder continues to burn long after exposed to air and can ignite structures and cause serious chemical burns resulting in significant tissue damage when it comes into contact with human flesh.

20. See Goldstone Report, *supra* note 1, at 21.

21. *Id.* at 399, 422–24.

22. *Id.* at 34.

23. *Id.* at 35.

24. For a comparative discussion of the investigatory and prosecutorial systems of the militaries of the United Kingdom and the United States, see GOI White Paper, *supra* note 3, at 114–17.

25. U.N. Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, U.N. Doc. A/HRC/13/53/Rev.1 (June 7, 2010) (Richard Falk), *available at* http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.13.53.Rev.1_en.pdf.

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XII

Lawfare Today . . . and Tomorrow

Charles J. Dunlap, Jr.*

A principal strategic tactic of the Taliban . . . is either provoking or exploiting civilian casualties.

Secretary of Defense Robert Gates¹

I. Introduction

Although he does not use the term “lawfare,” Secretary Gates’ observation reflects what is in reality one of the most common iterations of lawfare in today’s conflicts. Specifically, the Taliban are aiming to achieve a particular military effect, that is, the neutralization of US and allied technical superiority, especially with respect to airpower. To do so they are, as Secretary Gates indicates, creating the perception of violations of one of the fundamental norms of the law of armed conflict (LOAC), that is, the distinction between combatants and civilians.

While “provoking or exploiting civilian casualties” is clearly a type of lawfare, it is by no means its only form. Although the definition has evolved somewhat since its modern interpretation was introduced in 2001,² today I define it as “the strategy of using—or misusing—law as a substitute for traditional military means to achieve a warfighting objective.”³

As such, it is ideologically neutral, that is, it is best conceptualized much as a weapon that can be wielded by either side in a belligerency. In fact, many uses of legal “weapons” and methodologies avoid the need to resort to physical violence

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and other more deadly means. This is one reason, for example, that the United States and other nations seek to use sanctions before resorting to the use of force whenever possible.

Another illustration would be the use of a contract “weapon” during the early part of Operation Enduring Freedom to purchase commercially available satellite imagery of Afghanistan.⁴ This approach was equally or, perhaps, *more* effective than other more traditional military means might have been in ensuring the imagery did not fall into hostile hands. Additionally, most experts consider the re-establishment of the rule of law as an indispensable element of counterinsurgency (COIN) strategy. Finally, few debate that the use of legal processes to deconstruct terrorist financing is an extraordinarily important part of countering violent extremists.

In short, there are many uses of what might be called “lawfare” that serve to reduce the destructiveness of conflicts, and therefore further one of the fundamental purposes of the law of war. All of that said, others have given the concept a rather different meaning. Some couch it in terms of what is alleged to be the “growing use of international law claims, *usually factually or legally meritless*, as a tool of war.”⁵ Similarly, the privately run Lawfare Project openly acknowledges it concentrates “on the *negative* manipulation of international and national human rights laws” for purposes, it asserts, that are “other than, or contrary to, that for which those laws were originally enacted.”⁶

Some go even further. In 2007 respected lawyer-writer Scott Horton expressed concern that unnamed “lawfare theorists” purportedly consider that attorneys who aggressively use the courts in the representation of Guantanamo detainees and other terrorism-related matters “might as well be terrorists themselves.”⁷ More recently, much discussion of lawfare has centered on legal maneuvering associated with the Israeli-Palestinian confrontation. For example, some individuals and organizations see lawfare as “the latest manifestation in the sixty-year campaign to isolate the State of Israel.”⁸

In any event, these sometimes hyperbolic permutations on lawfare theories are not that espoused by this article. Among other things, it is certainly not the view of this writer that any party *legitimately* using the courts is doing anything improper. Instead, this brief article will focus more narrowly on the role of law in contemporary conflicts, principally that in Afghanistan.

It is true, as Secretary Gates’ comment suggests, that lawfare in the Afghan context has typically taken the form of the manipulation of civilian casualties to make it appear that US and allied forces have somehow violated legal or ethical norms. Thus, it could be said that lawfare itself is an asymmetrical form of warfare, one that is value-based and that seeks to outflank, so to speak, conventional military means.

Regardless, from this writer's perspective, the use of the term "lawfare" was always intended as a means of encapsulating for non-lawyer, military audiences the meaning of law in today's war. It was *not* intended to fit neatly into some political science construct. Rather, the sobriquet of "lawfare" was meant to impress upon *military* audiences and other non-lawyers that law is more than just a legal and moral imperative; it is a *practical* and *pragmatic* imperative intimately associated with mission success. In that respect, the growth of the term seems to have had some positive results.

II. Lawfare Today: Airpower and Civilian Casualties

Perhaps no aspect of what this writer would characterize as lawfare is more prominent than the restrictive rules of engagement imposed upon allied forces in Afghanistan in an effort to win "hearts and minds" by limiting civilian casualties. These restrictions go far beyond what LOAC requires, and are a classic example of efforts to "improve upon" LOAC via policymaking that insufficiently appreciates unintended consequences that can have, at the end of the day, decidedly counterproductive results. As a noncommissioned officer explained to columnist George Will in June of 2010, the rules of engagement in Afghanistan are "too prohibitive for coalition forces to achieve sustained tactical success."⁹ And other troops fighting there have raised similar concerns.

Airpower in particular has been cast—wrongly in my view—as a villain with respect to the civilian casualty issue. The Army and Marine Corps' COIN Field Manual (FM) 3-24,¹⁰ for example, discourages the use of the air weapon by claiming that "[b]ombing, even with the most precise weapons, can cause unintended civilian casualties."¹¹ Of course, *any* weapon "can" cause civilian casualties,¹² so it is not clear why air-delivered munitions should be singled out for "exceptional care," as FM 3-24 demands.

More important, the data show that *ground* operations can be vastly more dangerous to civilians than airstrikes. A study by the *New England Journal of Medicine* found that fewer than 5 percent of civilian casualties in Iraq during the 2003–8 time frame were the result of airstrikes.¹³ Regarding Afghanistan, a 2008 Human Rights Watch study of airstrikes found that it was the presence of troops on the ground that created the most risk to civilians, as the "vast majority of known civilian deaths" came from airstrikes called in by ground forces under insurgent attack.¹⁴

Even more recently, a National Bureau of Economic Research study found that only 6 percent of the civilian deaths attributed to International Security Assistance Force (ISAF) were the result of airstrikes. In fact, traffic accidents with ISAF vehicles

were two and a half times more likely to be the cause of the deaths of Afghan women and children than were airstrikes.

Nevertheless, ground commanders have insisted that civilian deaths could be curtailed with more troops. Army Brigadier General Michael Tucker suggested as much when he told *USA Today* in late 2008 that “[i]f we got more boots on the ground, we would not have to rely as much on [airstrikes].”¹⁵ Unsurprisingly, therefore, when General Stanley McChrystal assumed command in Afghanistan in June of 2009, he immediately issued orders that significantly restricted the use of the air weapon,¹⁶ and shortly thereafter called for a “surge” of mainly ground forces.¹⁷

It should be said that even before General McChrystal’s orders the coalition’s ability to use the air weapon was complicated by NATO’s own public pronouncements that distorted the understanding of the law of war, with tragic consequences.¹⁸ Specifically, in June of 2007 NATO declared that its forces “would not fire on positions if it knew there were civilians nearby.”¹⁹ A year later its statement was even more egregious, when a NATO spokesman preened that “[i]f there is the likelihood of even one civilian casualty, we will not strike, not even if we think Osama bin Laden is down there.”²⁰

This statement was not only insensitive to Americans cognizant of the horror of the bin Laden-inspired 9/11 attacks; it also works counter to the basic purposes of LOAC. Of course, zero casualties are *not* what LOAC requires; rather, it only demands that they not be excessive in relation to the military advantage anticipated. The law is this way for good reason: if “zero casualties” were the standard, it would invite adversaries to keep themselves in the company of civilians to create a sanctuary from attack. The Taliban heard NATO’s invitation and did exactly that.²¹

In any event, if the intent of the June 2009 airpower restrictions was to save civilian lives, it did not succeed. Although civilian deaths from the actions of NATO forces did decline,²² *overall* civilian deaths in Afghanistan nevertheless reached an all-time high in 2009.²³ And civilian deaths soared 31 percent in 2010 over 2009’s record-breaking figures. I would suggest that an obvious (albeit unintended) result of forgoing opportunities to kill extremists via airstrikes is that they live another day to kill more innocents.²⁴

This may be why the UN reported on June 19, 2010—about a year after General McChrystal’s order—that security in Afghanistan has “deteriorated markedly” in recent months.²⁵ Moreover, in terms of “winning hearts and minds,” analyst Lara M. Dadkhah raises the interesting point worth pondering in a February 2010 *New York Times* op-ed that the “premise that dead civilians are harmful to the conduct of the war [is mistaken, as] no past war has ever supplied compelling proof of that claim.”²⁶ That is proving to be the case in Afghanistan.

To his credit, General McChrystal did admit in December 2009 that there was “much about Afghanistan that [he] did not fully understand.”²⁷ In that respect, his assumption that seems to underlie his order—that civilian deaths inevitably work against the perpetrators’ cause—may be one of the things he did not correctly understand. For example, Ben Arnoldy of the *Christian Science Monitor* reports that the Taliban—not NATO forces—were responsible for the majority of civilian deaths in 2009.²⁸ Even though those deaths reflect a 41 percent increase over 2008, Arnoldy says that “there is little indication these Taliban indiscretions have backfired on the movement so far.”²⁹

Consider as well the Afghan reaction in September of 2009 when General McChrystal sought to apologize for the bombing of a hijacked oil tanker near Kunduz that allegedly killed seventy-two Afghans. The *Washington Post* reports that when General McChrystal began to apologize, a local “council chairman, Ahmadullah Wardak, cut him off” with demands for a tougher approach.³⁰ “McChrystal,” the *Post* recounts, “seemed to be caught off guard [by Wardak’s reproof]” as Wardak asserted that the allies have been “too nice to the thugs.”³¹

Jeremy Shapiro, a Brookings Institution scholar who served on a civilian assessment team for General McChrystal, analyzes Wardak’s remarks as saying that if the coalition is going to be a genuine provider of security for the people, that means: “[Y]ou’ll do what is necessary to establish control, and the very attention that the coalition pays to civilian casualties actually creates the impression among many Afghans that [coalition forces] in fact are not interested in establishing control and not interested in being the provider of security.”³² Shapiro concedes that the Afghan government has “highlighted” the civilian casualty issue but argues that it is doing so “because it serves to demonstrate [its] independence from the coalition and gives [it] leverage with the coalition.”³³ To his surprise, Shapiro says, local officials in his experience “tend actually not to be too concerned” with the civilian casualties.³⁴ In short, he concludes that while the civilian casualty issue “clearly resonates very strongly [in the United States] and in Europe . . . [it is] not clear that Afghans actually see this as a key issue.”³⁵

A Gallup poll released in February 2010 provides further data as to Afghan perceptions. Although the question of airstrikes was not directly addressed, it did show that beginning in June of 2009 (coinciding with the new restrictions on airpower) through the end of the survey period in late 2009, Afghans’ approval of US leadership in Afghanistan declined, as did their support for additional troops.³⁶

Obviously, the restrictions on airpower did not have the hoped-for “hearts and minds” effect. Further complicating the issue is the fact that, like those of Afghan civilians, *coalition* casualties also reached an all-time high in 2009.³⁷ And these disturbing casualty trends are continuing into 2010; by the end of September the

number of coalition casualties exceeded the record-breaking high of 2009.³⁸ Thus, however well-intentioned the airpower restrictions may have been, evidence of their efficacy is not apparent.

The deleterious effect on operations is unmistakable, as the deteriorating security situation noted in the UN report above attests.³⁹ At one time Taliban fighters cowered at American airpower.⁴⁰ Today, however, the *Air Force Times* reports that because of the new directive, the Taliban “no longer run and hide when they see a fighter jet overhead.”⁴¹ The *Times* quotes an Air Force pilot as expressing frustration “when you can see them shooting at our guys” and are obliged not to attack.⁴² The pilot laments that the enemy knows that “we are not allowed to engage in certain situations.”⁴³

At the same time airpower technology continues to develop even more discrete and effective ways to hunt the terrorists without the need to put thousands of young Americans in harm’s way. According to the *Washington Post*, “a new generation of small but highly accurate missiles” designed to limit collateral damage is being fielded for employment on remotely manned vehicles.⁴⁴ Such technology, the *Post* reports, along with better intelligence, has caused the “clamor over [drone] strikes [to have] died down considerably over the last year.”⁴⁵

While airpower alone is not—and *can never be*—the whole solution to today’s wars, rethinking it in the context of what today’s technology can provide might produce opportunities to fulfill the President’s intent of protecting Americans against terrorist attack in a less resource-demanding way,⁴⁶ and at the same time serve the interests of international humanitarian law’s effort to ameliorate the horror of war, and especially its impact on innocent civilians.

III. Lawfare Tomorrow: The Emerging Issues

The increasing controversy concerning “drones,” or, more accurately, remotely piloted vehicles (RPVs), is raising some interesting legal and policy issues with lawfare implications. By all reports, these weapon systems are extremely effective, particularly in eroding enemy leadership cadres. Yet a variety of objections have been offered as to their use.

Some of the attacks border on the absurd, and are reminiscent of medieval legal debates. For example, in A.D. 1139 Pope Innocent II and the Second Lateran Council condemned the missile warfare that was devastating Europe’s knighted aristocracy by calling slingers and archers “dastards” that are practicing a “deadly and God-detested art” with their stones and arrows.⁴⁷ Fast-forward to 2009, and we find former Australian Army officer David Kilcullen condemning the missile warfare that is devastating the terrorist aristocracy of the Taliban and Al Qaeda by

telling Congress to “call off the drones” in part because the militants view aerial attacks as “cowardly and weak.”⁴⁸

It is not clear why anyone should be concerned about the sensibilities of Taliban and Al Qaeda militants. Although Kilcullen and others seem to view the militants as courageous fighters seeking man-to-man fights, their use of indiscriminate improvised explosive devices—which grew 94 percent over the past year⁴⁹—plainly shows that *they* embrace remotely operated systems (albeit on the ground and not in the air). In addition, reports indicate that the Taliban are not only intermingling with civilians in the hopes of being shielded; media reports also say they are engaging in the vile practice of buying children to use as suicide bombers.⁵⁰

Almost as problematic as the “cowardly” objections to advanced warfighting systems is the emergence of the “targeted killings” debate. This has become something of a cottage industry within the human rights establishment. Many commentators seem to be frantically searching for ways to find the use of the highly effective RPVs somehow improper. A good example is the recent report of the UN’s Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions.⁵¹

One of the most disappointing aspects of the report was the allegation that RPV operators might adopt a “Playstation mentality.” This wholly speculative and unproven allegation questioning the professionalism of RPV operators is but one illustration of the report’s deficiencies. Moreover, the illogical suggestion that military or intelligence professionals would prefer to kill a terrorist as opposed to capturing and interrogating him is yet another indication of the report’s flaws.

Yet there *are* issues associated with RPVs. For example, in a recent issue of *Armed Forces Journal*, Peter Singer of the Brookings Institution raises issues about the status of RPV operators by questioning the propriety of the operation of the aircraft by other than military personnel.⁵² Perhaps as interesting—or more so—is the question of fully autonomous RPVs or other weapon systems.

As a practical matter, the current generation of RPVs generally requires a very permissive air environment to survive. To use the systems in contested airspace presents a variety of daunting technical challenges that must be overcome, not the least of which is the maintenance of continuous contact between the vehicle and its distant operator. Many experts believe that in the future the vehicle would have to operate autonomously, at least part of the time.

The world has not, however, been receptive to autonomous weapons systems. Exhibit “A” would be the near-universal ban on landmines we have today. When one examines the history of the ban, it becomes clear that emotional arguments predominated as opposed to tempered, rational discussions of how the weapons might be used in ways that actually reduce the destructiveness of war. Regardless, the experience of the landmine campaign may be something of a portent for

policymakers to consider, as science will inevitably provide the opportunity for the development of a whole family of partly or even fully autonomous weapons systems for use in air, land, sea and cyber domains.

IV. Concluding Observations

Any discussion of lawfare seems to invite conclusions that “the law” is somehow an impediment to successfully warfighting, especially in an era of irregular warfare waged by non-State actors.⁵³ It is true, as mentioned earlier in this article, that there certainly will always be those who will abuse the law for perverse purposes. That should not, however, suggest abandoning the law. Consider the thoughtful observations of Lawrence Siskind in response to the “lawfare” strategies of Hamas leveled at Israel:

When al-Qaeda terrorists used jet planes as weapons to crash into skyscrapers in 2001, the West did not abandon its airports and office buildings. Instead, it found ways to cope with danger without making fundamental changes to its business life. The fact that Hamas terrorists are cynically using another Western institution, the rule of law, as a weapon today does not mean that Western nations should abandon it. Instead, they must learn to adjust and cope.⁵⁴

In the twenty-first century we should expect to see further developments of lawfare. We may not like all of its iterations, but we should never forget that legal battles are always preferable to real battles, and modern democracies are well-suited to wage—and win—legal “wars.”

Notes

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49. See Londono, *supra* note 25 (citing UN report).

50. Sara A. Carter, *Taliban Buying Children to Serve as Suicide Bombers*, WASHINGTON TIMES, July 2, 2009, at 1.

51. See U.N. Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (Philip Alston), *available at* <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>.

52. P.W. Singer, *Double-Hatting Around the Law*, ARMED FORCES JOURNAL, June 2010, at 44, *available at* <http://www.armedforcesjournal.com/2010/06/4605658>. See also Gary Solis, *America's unlawful combatants*, WASHINGTON POST, March 12, 2010, at A17, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/11/AR2010031103653.html>.

53. The Department of Defense defines “irregular warfare” as a “violent struggle among state and non-state actors for legitimacy and influence over the relevant population(s). Irregular warfare favors indirect and asymmetric approaches, though it may employ the full range of military and other capacities, in order to erode an adversary’s power, influence, and will.” See Chairman of the Joint Chiefs of Staff, Joint Publication 1-02, *Dictionary of Military and Associated Terms* (Nov. 12, 2010, as amended through Dec. 31, 2010), *available at* http://www.dtic.mil/doctrine/dod_dictionary/.

54. Siskind, *supra* note 8.

XIII

The Age of Lawfare

Dale Stephens*

We are currently living in the age of lawfare; perhaps we always have been. The term, in its relationship to armed conflict, was most recently popularized by Major General Charles Dunlap of the US Air Force in 2001¹ and has generated an exponential and diffuse trajectory of meaning and critique since that time. The term “lawfare” has no real fixed definition, but has come to be generally understood as the “use or misuse of law as a substitute for traditional military means to achieve military objectives.”² It has been examined in the context of domestic US legal practices,³ in transnational legal incidents⁴ and, of course, within the realm of public international law, particularly in the context of the law of armed conflict (LOAC).⁵ All accounts do share a conception that recognizes that lawfare is concerned with the instrumentalization or politicization of the law to achieve a tactical, operational or strategic effect.

The reference to the “use or misuse” of law in the Dunlap definition reveals an essentially neutral perspective. The fact is that modern State military forces do legitimately use the law to achieve military outcomes. This is done as a substitute for the application of force and hence represents a form of lawfare so defined. This may be manifested with, for example, a UN Charter, Chapter VII, “all necessary

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means” Security Council resolution that displaces the law of neutrality or otherwise shapes the tactical or strategic military environment.⁶ Alternatively, it may also be manifested in a formal determination as to whether an armed conflict exists at all, whether it is international or non-international and/or whether an opposition group is to obtain prisoner of war rights or not. In this sense, the law is “weaponized” to achieve a desired military outcome that negates the need to apply force to obtain the same result. Indeed, recent scholarship on this body of law has highlighted the notion that LOAC practice itself is a process of construction, contestation and strategic instrumentalization that usually advantages State military forces.⁷ That the existing architecture of LOAC possesses this apparent bias⁸ for State military forces is not surprising. Under classical views States are the subjects, and not the objects, of international law. Moreover, from a policy perspective, this preference is both appropriate and necessary under the existing international legal structure. This is to ensure the right balance between internationally recognized military and humanitarian aims in warfare is maintained and that institutional accountability is effectively preserved.

While States engage in a type of structural lawfare to achieve military aims, the primary focus of this article is to examine the converse situation, namely, the manner in which lawfare is exercised against States. The strategic use of the law by non-State groups engaged in asymmetric warfare has been recognized as a significant tool to obtain military and political advantage. In these contexts, such groups will, *inter alia*, invite the application of force against themselves or their proxies, innocent civilians (as incidental injury), or ostensibly civilian objects (that have lost their protection) that, while strictly lawful, nonetheless generate political costs and/or moral dilemmas for the attacking force. The goal is to undermine the resolve of State military forces by generating negative reaction by relevant constituencies with political power.

Predictably, this type of lawfare prompts reactions concerning the “unfairness” of legal constraints applying to one side as compared to the wanton disregard of legal compliance by the other.⁹ Such asymmetric disadvantage is usually framed in terms of a dilemma within the literature for Western “law-abiding” military forces in meeting the threats while retaining a fidelity to the law. Lawfare is thus characterized in the register of formal legality of being a refuge of the weak,¹⁰ of being disingenuous by unfairly manipulating the law to achieve a relevant extra-legal and asymmetric effect.

It is the purpose of this article to review the phenomenon of lawfare to highlight how law is situated within the broader political, moral and social terrain of military decision making. The reactions against lawfare disclose a number of assumptions. Principally, the reactions against lawfare evidence a particular interpretive attitude

to LOAC, specifically one based squarely within a positivist orientation. Positivism remains the dominant interpretive idiom of LOAC, but it contains a number of vulnerabilities in its theoretical structure. It is a goal of this article to identify such vulnerabilities and to propose remedies that might be used to prompt a more self-aware counter-lawfare response within positivism's interpretive enterprise.

A broader goal is to tackle the issue of how the law is actually employed within military decision making. It will contend that while LOAC is often expressed in a key of validity, it should also be understood in a register of legitimacy. The factors that contribute to such an approach draw upon broader socio-legal and ethical considerations and these will be canvassed.

To this end, it is submitted that military lawyers and operators alike regularly synthesize legal propositions with broader political, social and moral considerations when dispensing advice and embarking upon a course of action. In so doing, this permits a more nuanced and surgical application of force that meets broader military and political goals. In short, it allows for effective mission accomplishment. It also allows for a firmer foundation in confronting lawfare and its intended manipulation of moral and political reaction. This assimilation of factors that occurs when developing legal advice is not always admitted, but it occurs nonetheless, and should be acknowledged and discussed for what it can add to the military appreciation process.

This is not to say that the register of formal legal validity has been dispensed with. Quite the contrary, a formal assessment of law is always the starting point in any interpretive exercise. Rules are carefully parsed and their linguistic construction assessed against standard canons of interpretation. However, the law is more indeterminate, language more malleable and open, than what we might imagine. In reality, the practice of LOAC takes place against a complex array of normative factors. Whether reconciled as acting within the "free space" of legal discretion permitted under positivism's structure or as a product of government-imposed policy overlay to ameliorate a rule's strictness, or indeed some other rationale, the result is the same. It remains true today that, at least since the Vietnam War, liberal democratic societies are compelled to wage war through a prism of self-perceived legitimacy. Modern military lawyers by necessity navigate this complex legal and political topography as a matter of course. It also means that confronting lawfare tactics head-on is not as daunting as it may at first seem.

This article is comprised of three parts. Part I will briefly examine the tenor of claims regarding lawfare so as to situate the subsequent analysis. Part II will canvass the dominant interpretive idiom of LOAC—namely, positivism—and will demonstrate the blind spots and gaps that this methodology generates. It will outline the remedies that are available to deal with lawfare (i.e., counter-lawfare) either

under positivism's method or more broadly under a complementary approach of LOAC practice within the register of legitimacy. Finally, Part III will conclude by examining the choices and orientation military lawyers might adopt in the context of counter-lawfare. To this end, assessment of means-ends rationality, constructivism and virtue ethics will be separately undertaken.

Part I. Lawfare and Its Taxonomy

The term "lawfare" has established a distinctly pejorative connotation within the prevailing literature. This seems unusual, as the term itself is value neutral. It is neither intrinsically "good" nor "bad," but rather an agnostic phenomenon. Indeed, as outlined in the introduction, established State military forces in the conduct of warfare can deploy a form of structural lawfare.

In the contemporary environment, allegations of lawfare are routinely cited as a tool used by insurgents or other non-State actors in actions against State military forces. This is the version of lawfare that has become more typically associated with the term. Hence, US Army lawyer Eric Jensen identifies that in the context of asymmetric warfare, an opponent will seek to exploit an adversary's weaknesses to seek tactical or strategic advantage. Such weaknesses are not necessarily those of military capacity, but rather are more intangible and revolve around inciting violent reaction that feeds public disquiet. Thus, "[i]n this type of conflict, the disadvantaged party must seek to use the comparatively low-tech tools at its disposal to gain the comparative advantage."¹¹ Such non-State groups will openly violate the law in order to strike at a more militarily superior though legally bound (thus restrained) force. As outlined by Jensen, such subversion takes the form of attacking from protected places and using protected places or objects as weapons storage sites, fighting without wearing a proper uniform, using human shields to protect military targets, using protected symbols to gain military advantage, murdering prisoners or others who are protected and not distinguishing oneself from the general population when taking a direct or active part in hostilities.¹²

The types of incidents detailed by Jensen almost always have an exception for the use of force by opponents. Under positive prescriptions of the law, protected places lose their immunity when used for military purposes,¹³ human shields may not be directly attacked (at least when not voluntary) but become part of the incidental injury calculation under proportionality assessments,¹⁴ and while fighting without a distinguishing uniform does threaten greater civilian loss due to misidentification, it does not prohibit State military forces from targeting those taking a direct part in hostilities (DPH).¹⁵

The point is not that legal arguments can't be relied upon in favor of surmounting these tactics, but rather that the political and social consequences of relying upon such exceptions can cause a negative effect. These exceptions highlight the moral dilemmas and political and social costs faced by soldiers when engaged in such conflict.

In this sense, it is significant that the main concern about lawfare is in fact the broader context in which law is invoked. Hence, as Casey and Rivkin state: "The term 'lawfare' describes the growing use of international law claims, usually factually or legally meritless, as a tool of war. The goal is to gain a moral advantage over your enemy in the court of world opinion, and potentially a legal advantage in national and international tribunals."¹⁶

It became clear during the counterinsurgency (COIN) operation within Iraq that insurgents invariably used unlawful means to intimidate the population and discredit the government. The whole point of using such unlawful means was specifically to invoke an overreaction by counterinsurgent forces. Provoking violation of counterinsurgent ethics and values in reacting to an insurgency is a means to an end, namely, discrediting the legitimacy of the host government and the counterinsurgent forces themselves. As David Kilcullen notes, Al Qaeda in Iraq drew the majority of its strength from the "backlash engendered by counterinsurgent overreaction rather than genuine popular support."¹⁷

When examined in these terms, the reaction against lawfare turns out to be less about the law itself than about the broader question of a political and moral reaction to the application of force that has the capacity to undermine military effectiveness. In this context, LOAC (and its sustaining interpretive model) is not particularly adept at providing a sufficiently calibrated response. The law is largely framed in a binary manner. It mainly deals with categories of persons: combatants, civilians and those *hors de combat*. It restricts attacks against military objectives¹⁸ and prohibits attacks against those objects that are civilian.¹⁹ It does not deal very well with nuance or effect. Hence within this binary code, decisions are made in an essentially "yes" or "no" manner—*viz.*, this military object over there may be attacked, that civilian one here may not; these civilians are a proportionate loss but those ones are not. Issues such as whether the object to be attacked is a church or a mosque that is being used for a military purpose have no formal relevance as a matter of law. Neither does the question whether the civilians who will incidentally die as a result of a proportionality equation are individuals who may be part of a particular broader social network. These underlying social and political factors are simply accorded no formal legal weight.

Notwithstanding this, attacking such objects, while lawful, will often have the inevitable effect of galvanizing resistance by a resident population, which, in turn,

may well undermine broader strategic goals. Similarly, whether an insurgent is a hard-core fanatic determined to die in his or her cause or an “accidental guerilla”²⁰ loosely swept into a broader movement is of no account as a matter of formal law; each may be targeted under DPH criteria. While some scholars have ventured that there may exist some level of cultural relativity in making assessments of “military advantage” or “proportionate” loss,²¹ the broad sweep of the law is predicated upon a conception of exchangeable universal value. There exists a pretense of mathematical certainty in making assessments of “military advantage units” versus “civilian loss units.” To this end, the appeal of universality sustains the law. It may be enough to respond to allegations of lawfare to say that “this is the law” and what we do is “lawful.” In certain contexts and to certain audiences, such assertions may be conclusive. In other circumstances and for other audiences, they may not be.

The reference to “the court of world opinion” identified by Rivkin and Casey has both an international and a domestic application. As discussed above, entirely lawful attacks within a theater of operations can result in popular resentment by those within that battlespace that translates into practical resistance. Equally, resistance may be manifested within domestic polities at home and can galvanize domestic reaction and decisively undermine military capacity. Hence, as Dunlap has observed when addressing this issue in the context of the Vietnam War:

The United States has already seen how an enemy can carry out a value-based asymmetrical strategy. For example, one of the things that America’s enemies have learned in the latter half of the 20th century is to manipulate democratic values. Consider the remarks of a former North Vietnamese commander: “The conscience of America was part of its war-making capability, and we were turning that power in our favor. America lost because of its democracy; through dissent and protest it lost the ability to mobilize a will to win.” By stirring up dissension in the United States, the North Vietnamese were able to advance their strategic goal of removing American power from Southeast Asia. Democracies are less-resistant to political machinations of this sort than are the totalitarian systems common to neo-absolutists.²²

These lessons have been fully absorbed by military professionals, especially by military lawyers. It has become clear that there are “good” and “bad” wars, just as there are wars of necessity and wars of choice.²³ Public conscience on issues of force in relation to both the *jus ad bellum* and *jus in bello* has real impact. As a result, the levels of discretion exercised under the law differ due to imposed government/command policy restraints. While prevailing textbooks and restatements of LOAC present a picture of almost clinical certainty, the truth of the matter has always been more nuanced. Law and legal interpretation are modulated. Legal rectitude is the starting point and of course universal prohibitions are always formally

acknowledged (i.e., not attacking civilians, respecting hospital ships, etc.), but legal interpretation invariably accommodates implicit counter-lawfare elements at least as a matter of policy overlay. Legitimate targets are not attacked and extraordinary measures are taken to spare civilian populations from any incidental injury. Is this approach consistent with positivism's method? Is this really a policy overlay or does it fall within "proper" legal interpretation? As will be outlined in Part II below, such accommodations may still be conceived as validly coming within the structure of positivism's methodology.

Part II. Positivism, Legitimacy and Lawfare

Law and Morality

Positivism remains the dominant interpretive idiom of LOAC. As an interpretive style, it is venerable and hardy and has withstood numerous challenges to its dominance throughout the twentieth century. While regarded as too illusory by some scholars,²⁴ it nonetheless heralded a momentous change to international law when embraced at the turn of the nineteenth to the twentieth century. Reading accounts of international law in the 1920s, one gets a palpable sense of positivism's great emancipatory promise.²⁵ While international law in the nineteenth century was largely bound up in sovereign prerogatives and naturalist conceptions, the onset of the twentieth century saw law harnessed for progressive causes. Positivism was the means by which such progress was to be realized. While international courts initially resisted impositions by positive law on sovereign prerogatives,²⁶ over time even these nebulous rights were quietly relegated as products of an earlier era.²⁷

The legal philosopher H.L.A. Hart in his 1962 account *The Concept of Law* probably best describes positivism's contemporary structure.²⁸ To Hart, positivism was fundamentally centered on a separation thesis, that is, legal validity was not necessarily tied to any moral inquiry.²⁹ Rather law was a combination of primary and secondary rules that was sustained by an inner social perspective of law's officials.³⁰ The rule of recognition was the most significant secondary rule,³¹ and essentially established what was law in terms of pedigree. The rule of recognition itself was based upon social fact. Significantly, words did a considerable amount of work within positivism and Hart conceived of a duality of core and penumbra for framing interpretive discourse.³² Within the core, words possessed unassailable meaning. Law was thus ascertainable and largely predictable. At the border of the core, within the narrow penumbral region, the law was less determinate and a broader level of discretion was permitted to determine legal outcomes. Indeed, Hart allowed for a policy- or legislative-type reasoning within this narrow band.³³

The separation thesis, which sustains much of Hart's approach, was famously outlined in an exchange with Harvard professor Lon Fuller in a series of articles appearing in the 1957–58 edition of the *Harvard Law Review*.³⁴ In question was the status of laws passed during the Nazi regime in Germany. Fuller invoked a form of naturalist legal methodology to argue that such edicts could not constitute law. Hart presented a differing view; while such laws were morally bankrupt, they nonetheless still constituted law properly adopted in accordance with a prevailing process.³⁵ Importantly, Hart did fully acknowledge that while they were still deserving of the name "law," one could nonetheless rely upon personal moral grounds not to obey such law.³⁶

This dichotomy reveals much about positivism that has application within LOAC reasoning and more broadly within the context of lawfare. While it is plain that "no sensible positivist . . . would claim that morality is never relevant or necessary for legal interpretation,"³⁷ positivism is essentially a non-directive form of interpretation.³⁸ When one is resolutely within the core meaning of words (and sentences)³⁹ there remains a requirement to follow the course of such wording to its necessary end to reach an inevitable legal result. This is done notwithstanding that what occurs may in fact appear to be "a wrong or unjust or unwise or inequitable or silly result."⁴⁰ This differentiation between law as it "is" and what it "ought" to be (at least within the core) has the potential to cause blind spots and contradictions in legal interpretation. Yet, it is resolutely defended by many as the appropriate measure of legal interpretation and has resisted inroads by alternative legal theories. Former US Attorney General Michael Mukasey has, for example, strenuously argued that government lawyers must ensure they only "do law."⁴¹ He outlines that a lawyer's primary duty is

to define the space in which the client may legally act. . . . [T]here will be times when you will advise clients that the law prohibits them from taking their desired course of action, or even prohibits them from doing things that are, in your view, the right thing to do. And there will be times when you will have to advise clients that the law permits them to take actions that you may find imprudent, or even wrong.⁴²

Judge Higgins in a famous defense of this methodology reaffirmed the perspective that the practice of law is best conceived of as the application of "neutral principles" to achieve predictable outcomes.⁴³

This conception is reflected in traditional approaches to interpreting LOAC. There is usually an emphatic confidence in the literature that LOAC is comprised of a broad core of validity. To be sure, even a provision such as the famous Martens clause that makes a direct appeal to the "dictates of public conscience"⁴⁴ has been

strenuously argued to be no more than an aid to interpretation of existing positive law and certainly not a source of legal authority in its own right.⁴⁵

This reliance upon pedigree of legal norms and the strong confidence placed in the core structure of words seems a little too emphatic in the literature. Indeed, such a patois might be read as reflecting a type of anxiety as to the capacity of law to actually restrain violence. The LOAC project was always placed between a promise and a fear⁴⁶ that law would intercede and ameliorate the excess of warfare's violence.

Given the strong differentiation between law, morality and policy considerations, at least resident within core meanings of words and sentences, there should be little surprise that lawfare is derided as unfair. Compliance with the law concerning the propriety of certain attacks is the formal answer to those who take issue with the moral, social and political consequences of such attacks. Lawyers are ill equipped to respond with anything more than extolling the virtue of compliance with the law as it exists. Arguments in support of structural rectitude and of linguistic construction are what sustain legal responses. Despite this, to relevant publics "out there" such exquisite compliance and faithfulness may not be persuasive, indeed may not be worth "two straws."⁴⁷ This necessarily leaves open a number of vulnerabilities to such advocacy.

It also relies upon the picture painted by Hart (and others) that the law comprises a large inner core of meaning. If, in fact, the law (especially LOAC) is less determinate than what many imagine, if language is so intrinsically malleable that we can flip between the core and the penumbra with greater ease than what we anticipate, then many of the assumptions that underpin "proper" interpretive technique become undone. However, in accepting these factors we have new challenges, but also better opportunities to align legal advice with a greater moral and political acuity and so may confront lawfare more instrumentally.

Core/Penumbra and the Malleability of Language

Many scholars have critiqued the semantic certainty implicit in the core/penumbra distinction. Winter, for example, observes that Hart fails to appreciate that the cognitive process of ascribing a purpose to words that we necessarily make means the "distinction between a policy-free core and a penumbra of 'legislative' freedom necessarily collapses."⁴⁸ According to Winter, we all operate in accordance with tacit knowledge and seek to attribute a meaning to words that will give effect to an underlying policy. Language is by nature malleable, rendering the placement of a firewall between open (penumbra) and closed (core) discretion an arbitrary exercise. Duncan Kennedy has adeptly demonstrated that the "self-evident" placement of words within the core or penumbra is a highly contentious exercise. Hart

advocated that “plain cases”⁴⁹ would always be easily discernible, but Kennedy argues that through “legal work”⁵⁰ we can find ourselves within either the constrained core or the open textured penumbra whenever we wish to exercise a more political discretion. Either way, we can construct a desired result. In essence, Kennedy concludes that determinacy is “a function of the worlds of valid norms, and of the content of other sources, *and also* of their interaction with the resources and strategies of whoever has the power to do legal interpretation.”⁵¹

The Malleability of Language and Common Article 3

The malleability of language within LOAC was amply demonstrated in the course of the internal Bush administration debates concerning the application of Common Article 3 (CA 3) to the war in Afghanistan. Writing in January 2002, Deputy Assistant Attorney General John Yoo determined that the conflict then under way in Afghanistan was an international armed conflict. However, according to Yoo, neither Taliban nor Al Qaeda detainees were accorded prisoner of war status, because Afghanistan was a “failed State” and therefore the Geneva Conventions did not apply.⁵² The question then to be decided was whether CA 3, which set a minimal humanitarian standard for detainee treatment, applied as a matter of law. Yoo determined that it did not and drew heavily upon a textual analysis of the provision. Significantly, the opinion Yoo drafted had an especially narrow determination of the application of CA 3 of the four 1949 Geneva Conventions. Yoo opined that CA 3 (which applies to “conflicts not of an international character”) was intended to apply only to a condition of civil war or “large scale armed conflicts between a State and an armed movement within its own territory.”⁵³

The opinion specifically relied upon a close textual analysis, as well as a historical account of the negotiating history and past practice of States. It concluded that if CA 3 was to have a “cover all” reach, then it would have used “broader language.”⁵⁴ The “precise language”⁵⁵ actually used restricted it to the type of conflicts identified.

In reply, William Taft, the Department of State’s Legal Advisor, responded by taking issue with the reading of the applicability of the Geneva Conventions, stressing that “[t]he President should know that a decision that the Conventions do apply is consistent with the *plain language* of the Conventions.”⁵⁶ Moreover application of the Conventions “demonstrates that the United States bases its conduct not just on its policy preferences but on its international legal obligations.”⁵⁷

Ultimately, President Bush determined that CA 3 did not apply *de jure* but “as a matter of policy” humane treatment to the extent “consistent with military necessity”⁵⁸ would be accorded to detainees.⁵⁹

Subsequently, the executive assertion that CA 3 did not apply to the conflict with Al Qaeda was litigated before the Supreme Court. In the 2006 *Hamdan* case,⁶⁰ the Court held that the term “conflict not of an international character” contained within CA 3 was used in contradistinction to “conflict between nations.” Hence the phrase “‘not of an international character’ bears its literal meaning”⁶¹ and, as such, applied effectively to all armed conflicts that are not between nation-States, thus constituting CA 3 and its minimal standards as a “cover all.”

The remarkable feature of this composite line of executive and judicial reasoning was the reliance upon “precise,” “plain” and “literal” meaning of the words and yet such reliance produced widely divergent conclusions. In its terms the Yoo opinion was a credible enough exposition of the law, yet it seemed profoundly wrong in its recognition of a gap vis-à-vis a legal obligation to observe even minimal humanitarian standards for detainees. Were Taft and the Supreme Court better at linguistic construction and was CA 3 terminology “self-evidently” in the core of meaning? Or perhaps was “legal work” at play? Was this rather about wise international relations (IR) policy,⁶² or perhaps checking executive excess⁶³ or perhaps retaining a moral high ground for instrumental reasons?⁶⁴

The debate about the semantic placement of CA 3 is replicated with numerous key terms throughout LOAC. Issues concerning the correct interpretation of “military advantage,”⁶⁵ of the “nature” of an objective that renders it liable to attack,⁶⁶ of whether “war-fighting or war-sustaining” capability is a legitimate military objective,⁶⁷ of how “reasonable” must be the grounds for boarding and attacking vessels under the right of visit and search or blockade in naval warfare,⁶⁸ of the issue of sufficient “effectiveness” in aerial and naval blockade,⁶⁹ of the application of the precautionary principle to weapons selection (particularly by those countries possessing high-technology weaponry)⁷⁰ and, of course, what counts as “proportionate” loss⁷¹ are all illustrative of the many interpretive issues that occupy contentious and/or ambiguous decision making under the law. Invariably many of these matters are usually decided by recourse to “judgment.”⁷² Within this indeterminacy it becomes evident that legal arguments are calibrated less in terms of lawful and unlawful, and more in terms of differing degrees of lawfulness. In so doing, a different style of legal reasoning develops that is more amenable to policy influence. Perhaps this can be reconciled with Hart’s sense of penumbral reasoning, or perhaps it indicates that the register of legitimacy (with a small dose of Holmes’s predictivism)⁷³ provides better explanatory power for how LOAC is applied in practice, an explanation that gives a sufficient basis to deal with the political and moral advantage sought to be generated through lawfare.

The Register of Legitimacy

Writing in 1952, Sir Hersch Lauterpacht famously observed that “if international law is . . . at the vanishing point of law, the law of war is perhaps even more conspicuously at the vanishing point of international law.”⁷⁴ This dire warning of LOAC’s diminished relevance has in fact been breathtakingly challenged in succeeding years and rendered meaningless. Over the past few decades there has been an “explosion” of treaties, restatements, handbooks, institutional assimilation and deep professional military and academic investment with LOAC. This has been partly driven by a strategy of pragmatic engagement by humanitarian voices.⁷⁵

Rather than law becoming assimilated at the “vanishing point” of international politics, the reverse seems to have happened. LOAC and its underlying principles have been embraced by political elites and invoked in a vernacular of legitimacy to further broader strategic claims. Certainly from the first Gulf War onward, law has been invoked and heralded as providing decisive support for broader campaign advocacy.⁷⁶ There is no doubt now that compliance with the law forms part of the political discourse as to the legitimacy of a conflict. Witness the negative consequences of the Abu Ghraib events in Iraq,⁷⁷ or even more recently, the German-initiated tanker attack in Afghanistan,⁷⁸ to identify the correlation between *jus in bello* considerations and broader political and social identification with the legitimacy of a military campaign.

This phenomenon is being tracked within the legal literature. David Kennedy has observed that the practice of international law, and especially that of LOAC, has become a variegated process of input and reaction from relevant constituencies. Traction of legal arguments has become measured more in terms of persuasion within such constituencies than technical mastery of legal construction. In short, a register of legitimacy complements that of legality. Kennedy notes that “[i]nternational law has become the metric for debating the legitimacy of military action . . . [and that] law now shapes the politics of war,”⁷⁹ and, further:

In the court of world public opinion, the laws in force are not necessarily the rules that are valid, in some technical sense, but the rules that are persuasive to relevant political constituencies. Whether a norm is or is not legal is a function not of its origin or pedigree, but of its effects. Law has an effect—is law—when it persuades an audience with political clout that something someone else did, or plans to do, is or is not legitimate. . . . The fact that the modern law in war is expressed in the keys of both validity and persuasion makes the professional use of its vocabulary both by humanitarian and military professionals a complex challenge.⁸⁰

In this context, ethical and political corroboration with legal rules becomes inevitable. We leave behind the smooth reassurance of an external judicial standard

and enter a more dynamic though unfamiliar and contentious world—one where law has its rightful place, but its purchase is of a variable nature. In describing this recent phenomenon Kennedy observes:

International lawyers became less interested in whether a rule was valid—in the sense that it could be said to be rooted in consent, in sovereignty or in the nature of an inter-sovereign community—than in whether it worked. International law was what international law did. The observations of sociologists or political scientists about what functioned as a restraint or a reason became more important than the ruminations of jurists in determining what international law was and was not. As one might imagine, it became ever less possible to say in advance or with precision what rules would, in fact, be effective as law. To do so was to make a prediction about what would, in the end, be enforced. Acting under cover of law became a wager that the action's legality would be upheld in the unfolding of state practice. Moreover, it became clear that the effectiveness of rules depended less on something intrinsic to the rule than on aspects of society—how powerful was its proponent, how insistent its enforcement, how persuasive its reasons to the broad public who would determine its legitimacy.⁸¹

The perspective presented by Kennedy concerning the variable nature of legal norms is representative of a wave of critical reassessment. Over the recent past there have been a number of theories put forward that seek to rationalize the relativity of legal norms within international law. Whether predicated upon notions of “compliance pull”⁸² or theories of transnational politico-legal iteration,⁸³ they all share recognition of a corroborative role of politics/policy as fused with conceptions of legitimacy. In assessing the themes proffered, a model of the law as a justificatory discourse⁸⁴ begins to emerge, one that belies too obvious political self-interest with appeals to a broader legitimacy. This is not to say that bad legal arguments cannot still be distinguished from good ones.⁸⁵ It does acknowledge though that the vernacular of persuasion has more resonance than appeals to pedigree or some kind of external validity. As one commentator has noted, legal discourse within the international realm is not

the search for some legal truth “out there,” waiting to be discovered. It is a practice that operates on the basis of common understandings and shared beliefs about the relationship governed by the rules in question. Thus interpretation of international law is the search for an intersubjective understanding of the norm at issue.⁸⁶

Critically, the point is not one of “all things considered” subjective policy choice, but rather choice within the indeterminacy of the law. Such choice has been likened to “politics within the law”⁸⁷ or perhaps the “legalisation of politics.”⁸⁸ In determining how choices are to be made, some commentators have pointed to the

role of “general principles” of the law as reflected in Article 38(1)(c) of the Statute of the International Court of Justice as providing a durable catalog. Such principles proliferate throughout international law and often form complementary and opposing pairs.⁸⁹ Hence within LOAC, the principle of military necessity is counterpoised against the principle of humanity, and each may be relied upon to advance a particular interpretive perspective. Kalshoven has argued that such principles themselves reflect particularized social, historical and ethical traditions and are sustained by an “inner force”⁹⁰ that is “moral in nature.”⁹¹

The move to a frame of legitimacy and to acknowledging the power of political persuasion as part of a justificatory process signals a significant departure from the positivist firmament of external standards and linguistic precision. Perhaps we are still within the positivist frame but are situated deeply within the penumbral region described by Hart where a more freewheeling exercise of policy-like discretion is permitted. If so, the penumbra is more than just a narrow band, but rather occupies a much larger space. The type of legal practice and interpretive style currently being theorized actually signals a reflection of the type of reasoning advanced by the American legal realist movement of the 1920s and '30s. This movement sought to accommodate the indeterminacy of law and in so doing wanted to implement a more self-aware process of legal reasoning⁹²—one critically predicated upon a conception of social scientific methodology that could more productively guide relevant canons of interpretation.⁹³

Counterinsurgency, Stabilization Operations and American Legal Realism

This move to a more instrumentalized form of legal reasoning has found explicit expression in the recently published US COIN and stabilization doctrines. Legal interpretation of LOAC became contextualized in seeking to achieve specific political and military outcomes. The US COIN doctrine was developed against the exigencies of the increasing violence in Iraq in 2005–6. General Petraeus and others reviewed counterinsurgency best practices, and thinking “outside the box” developed a strategy for dealing with the increasingly pressing insurgency. It was in fact a blueprint for “a strategy waiting to be implemented as everything else failed in Iraq.”⁹⁴

The resulting COIN manual grapples with the new realities of postmodern war and recommends decisive change. Indeed, the introduction to the manual makes it very clear that it intends to set a new course. Within the first paragraph, the point is abruptly made that “[t]hose who fail to see the manual as radical probably don’t understand it, or at least understand what it’s up against.”⁹⁵

The manual deals with a number of legal propositions and directs an interpretive methodology that is decisively instrumental. These are tailor-made to attain strategic effect within the context of an insurgency. The doctrine contains a number

of paradoxes that seem counterintuitive to prevailing approaches to legal interpretation. These include:

- Sometimes, the more you protect your force, the less secure you may be,⁹⁶
- Some of the best weapons for counterinsurgents do not shoot,⁹⁷
- Sometimes, the more force is used, the less effective it is,⁹⁸ and
- The more successful the counterinsurgency is, the less force can be used and the more risk must be accepted.⁹⁹

It is evident that COIN doctrine knowingly places greater physical risk on counterinsurgent forces. It fully concedes that choices will need to be made that will result in higher counterinsurgent casualties. These truisms necessarily test resolve as well as public expectation. They also provide a meaningful counter to the political and moral advantage that is sought by insurgent forces through lawfare techniques. It turns out that political and social success in the field provides the best antidote to lawfare susceptibility at home as well as within the relevant theater of operations.¹⁰⁰ The COIN and stability operations doctrines have proven, within Iraq at least, to provide a reliable framework to reach that goal. General restraint and an allocation of particular ethical and social value to the consequences of violence have provided a more durable context for legal interpretation.

Within an insurgency, those taking a direct or active part in hostilities are ostensibly targetable under the DPH provisions of LOAC. As outlined earlier in this article, little differentiation is traditionally made between hard-core insurgents and those who are more loosely associated with an insurgency (but who nonetheless come within the DPH formula). There is, as previously highlighted, an assumption of mathematical precision that underpins this approach to legal reasoning under LOAC. In challenging this blanket legal categorization the Multi-National Force–Iraq guidelines, reflecting the COIN doctrine, introduced a more nuanced targeting strategy that was based upon the question of reconcilability and modified legal approaches. Hence the guidelines stated bluntly:

We cannot kill our way out of this endeavor. We and our Iraqi partners must identify and separate the “reconcilables” from the “irreconcilables” through engagement, population control measures, information operations and political activities. We must strive to make reconcilables a part of the solution, even as we identify, pursue and kill, capture or drive out the irreconcilables.¹⁰¹

This required a greater use of intelligence to understand deeper tribal and provincial networks and allegiances. Understanding relevant ethnography and intra-tribal group dynamics gave a better context for instrumental thinking. It also

meant that a substantive differentiation could be made between the hard-core insurgent and the “accidental guerilla” with respect to targeting. These more nuanced approaches combine with a revised legal interpretive methodology that seeks to promote a particular effect with respect to targeting choices.

In relation to the principle of proportionality, the COIN manual similarly signals a self-conscious variation on the manner in which this legal standard is usually interpreted by concentrating upon political and social alienation. The manual states:

In conventional operations, proportionality is usually calculated in simple utilitarian terms: civilian lives and property lost versus enemy destroyed and military advantage gained. In COIN operations, [military] advantage is best calculated not in terms of how many insurgents are killed or detained, but rather which enemies are killed or detained. . . . In COIN environments, the number of civilian lives lost and property destroyed needs to be measured against how much harm the targeted insurgent could do if allowed to escape.¹⁰²

The commentary notes that the principles of discrimination and proportionality have an additional sociopolitical significance that must be factored into any interpretive exercise under the law, stating that “[f]ires that cause unnecessary harm or death to noncombatants may create more resistance and increase the insurgency’s appeal—especially if the populace perceives a lack of discrimination in their use.”¹⁰³

Law, Legitimacy and Interpretive Space

In reconciling the recourse to legitimacy with legal interpretive theory, a broader opportunity arises to grapple with lawfare—not least of which is the ability to meaningfully address the political and moral advantage sought by non-State actors. The COIN and stability operations doctrines provide an illuminating insight into how the calibrated application of force can result in achieving identified military and political effects at the tactical, operational and strategic levels. Indeed, military journals these days disclose a fascination by military operators with the implications of force in terms of psychological, sociological and anthropological effect as a means of fulfilling mission accomplishment goals.¹⁰⁴ Military lawyers have, of necessity, been part of that experience.

When we speak in the register of legality in familiar terms of classic modern positivism, we must be aware of what this implicates and the vulnerabilities it exposes. We still rely upon this methodology because it retains sufficient explanatory “horsepower” for some audiences in some circumstances. Such circumstances would, of course, encompass formal litigation processes. They would also be more likely in a

“State-on-State” conventional warfare context, which is the background in which LOAC was principally developed, or even when dealing with an “irreconcilable” in a COIN context. The disquiet that is felt by some that lawfare techniques can undermine military efforts seems geared to this concept and context of legal exposition.

As has been outlined, however, the register of formal legality is not well equipped to deal with social, political or moral critiques. But this is only one concept or version of interpretive valence. In a broader day-to-day context, the interplay between law, legitimacy, policy and politics has become well understood by military lawyers, if not expressly, at least intuitively as a different narrative of the law. Some might reconcile these interactions as mere policy overlay of hard law at the core of legal meaning. Or they could perhaps be reconciled as occurring in the (broad) penumbral region of discretion of Hart’s conception of positivism, or by invoking and assimilating American legal realist techniques (we are, after all, “all realists now”),¹⁰⁵ or perhaps as forming a competing legal methodology of normative legal relativism and pluralism.

However these interactions are reconciled from a theoretical perspective, the fact is that military lawyers have in practice adopted a more informed attitude to interpretation that has kept pace with broader national and international strategies for military action. The recent COIN and stabilization doctrines and their supporting interpretive legal approaches are designed precisely to counter adverse political and social reaction in order to obtain military advantage. They represent strong elements of counter-lawfare in their ontological premise. As will be discussed below, departing the safe moorings of a register of legality for one of legitimacy allows for a more instrumental approach to achieving mission outcomes. Though not without risk, it also offers the means by which lawfare techniques used by non-State actors can be decisively met and defeated.

Part III. Legal Choice by Military Lawyers in a Pluralist Environment

If, as I have contended, the legal framework of LOAC generates considerable interpretive space, military lawyers necessarily have a complex responsibility in reconciling multiple factors when shaping their advice. Notwithstanding this challenge, it is a theme of this article that military lawyers are well equipped to deal with lawfare. Such skills have developed quite independently as part of the general nature of dispensing advice within LOAC practice. The purpose of this part is to explore the exogenous factors that underpin military legal decision making. First will be an analysis of means-ends rationality, looking particularly at IR theories as to how the law is used to mobilize political action. Second will be an examination of constructivism, which seeks to demonstrate how internalization of normative legal

standards can result in generating a sense of self-identity and interpretive attitude. Finally, the part will conclude with a survey of virtue ethics, which have particular resonance within the military ethos and can be understood as a basis for adopting particular legal strategies of support or resistance.

Means-Ends Rationality and Politicization of Law

Public opinion is often readily acknowledged by military lawyers as having considerable effect in driving government policy. Of course in the context of lawfare, domestic public opinion is a decisive strategic target, yet there is little understanding of how law gets metabolized by advocates to prompt the type of political mobilization that subsequently shapes opinion.

To this end international lawyers and international legal scholarship generally exhibit what Jack Goldsmith has referred to as a “methodological unsophistication.”¹⁰⁶ Lawyers generally have a predilection to favor formal over functional and are less interested in examining causality.¹⁰⁷ They tend to assume law’s role in directing policy choice as a given. Conversely, IR theory seeks to explain international behavior more “realistically” and thus takes “theoretical, methodological, and empirical issues more seriously, and . . . draw[s] more generously on economics, sociology, and history.”¹⁰⁸ Generally speaking, IR scholars review international behavior in terms of power, interests, institutions, beliefs or ideas. International law can have normative effect within these mechanisms of influence but not in the manner in which most lawyers possibly anticipate.

In describing how international legal norms can be invoked to initiate or sustain political mobilization, Simmons observes that treaty ratification can be seen as an anchor for creating domestic and international advocacy networks; hence “[t]reaties can change values and beliefs and can change the probability of successful political action to achieve the rights they promulgate.”¹⁰⁹ She notes that ratification affects elite agendas, supports litigation and has a particular capacity to mobilize political action among epistemic communities.¹¹⁰ Treaty ratification, according to Simmons, signals not only a “costly signal of intent,” but also marks a decisive step in “domestic legitimation,” thus fostering a precommitment to receptivity by a government, increases the size of the mobilizing coalition, enhances “intangible” resources and expands the range of political and legal compliance strategies.¹¹¹ Similarly, Keck and Sikkink catalog how treaty ratification creates channels of access for those motivated by shared values and structured mechanisms for information exchange. These authors present both rationalist (language of incentives and constraints, strategies, institutions, rules) and constructivist (norms, social relations and intersubjective understandings) foundations to ground their analysis of the mechanisms of social and political pressure that can be generated by

politicizing legal norms.¹¹² Interestingly, the authors refer to “frames” of meaning¹¹³ to “alter the information and value contexts within which states make policies,” which in turn involve “not just reasoning with opponents, but also bringing pressure, arm twisting, encouraging sanctions, and shaming.”¹¹⁴

The concept of framing provides a useful context for understanding LOAC politicization. The issue of banning anti-personnel landmines, for example, which ultimately resulted in the drafting of the Ottawa anti-personnel mines convention,¹¹⁵ was originally discussed in terms of military utility and saving soldiers’ lives. When the debate was subsequently “framed” by advocates in terms of indiscriminate effect upon civilians, there developed an unstoppable momentum for universal banning. It is in the context of individual vulnerability to military violence that political mobilization of LOAC norms seems to be the most effective. Keck and Sikkink note that “issues involving physical harm to vulnerable or innocent human individuals appear particularly compelling”¹¹⁶ for network organization (issue of framing personified). Consistent with this observation, it is not surprising to see that trenchant arguments of *lex specialis* vis-à-vis international human rights law are usually relaxed when it comes to issues such as detainee treatment. Even if the *de jure* extraterritorial application of human rights law is not accepted, at least its normative underpinnings are observed through humanitarian policy stipulations—partly as recognition of that public expectation that such standards will be applied.

This recognition of the use of law to press moral and political leverage from a domestic audience is not lost on military lawyers and, of course, is relied upon as part of any lawfare campaign. Means-ends rationality concerning public support is implicitly part of the military decision-making calculus that underpins approaches to the law, whether consciously acknowledged or subconsciously registered. LOAC includes tremendous license for the application of destructive power; however, its full exercise is unlikely to be pressed. Indeed, legal assessment of mainstream military action is rarely undertaken to decide whether something is legal or illegal. Rather, as previously noted, it is much more a case of deciding between various iterations of legal justification and construing the better arguments, which may range from merely colorable through to compelling. Deciding whether something is merely legal, of course, does not mean that it is good policy and this is where means-ends rationality invariably enters the equation. Questions concerning public support, institutional reputation, ethical orientation, self-image, internal discipline and numerous other inchoate factors are part of that mix. In discussing the nature of the resistance exhibited by a number of senior US military lawyers to aspects of the Bush administration’s legal framework for the war on terror, Hatfield notes: “The military lawyers deferred to the law as an accumulation of hard-won institutional

wisdom. They believed the law against torture to be a reality-based warning to keep us from being doomed to learn the same lessons (usually referred to as ‘those from Vietnam’) again and again.”¹¹⁷

The Vietnam War and its consequences loom large in the literature. There is a sense that something intangible was lost in that conflict and that the decades since have been devoted to a restoration of professional ethos within the military and a reach for renewed public trust. The specific correlation between the Vietnam conflict and LOAC is also emphasized. In a recent article, retired Colonel David Graham observes that events like the My Lai incident “caused great consternation and soul searching among Americans generally,”¹¹⁸ and was a catalyst for initiating comprehensive and profound revision and prioritization of the law of war training within the military.¹¹⁹

If lawfare is partly predicated upon a strategy of decisively influencing public opinion, then it is logical that lawyers should better understand applicable IR theories that detail the pathways in which law is politicized for this very purpose. Indeed, the incorporation of public affairs officers within most chains of command evidences the general institutional recognition by the broader military of the decisive power of public opinion in liberal democratic societies. Due to a number of reasons, not the least of which is a lack of relevant social scientific training,¹²⁰ lawyers seem reluctant to undertake an analysis of law’s effect upon political mobilization. These perspectives allow lawfare strategies a head start. The rationalist and constructivist methodologies used by advocacy groups to influence political decision making should be better understood so that alternative arguments can be meaningfully mounted in response. Similarly, the issue of “framing” LOAC issues to mobilize public opinion in order to achieve a particular political result might be usefully studied to better understand and anticipate different perspectives.

Constructivism and a Logic of Appropriateness

Constructivism is an ideational theory of IR that posits that national interests are shaped by international structures. Hence national identity is partly “constructed” by international legal norms that create and disperse beliefs. This realization is predicated upon the partial or full internalization of legal norms through a process of coercion, persuasion or acculturation,¹²¹ leading to an overall acceptance of the normative force of international law, in this case LOAC. A “logic of appropriateness” as opposed to a “logic of consequence”¹²² ensues; hence it is less instrumentalist than other competing IR theories.

Under the constructivism mantle, psychological factors can permit “shaping” of perspectives through a conscious or unconscious acknowledgment of global military isomorphism.¹²³ Moreover, constructivism seeks to provide an answer for

normative adherence to the tenets of LOAC. Examples of this process at work through the constructivist lens would include the unique universality of ratification of the 1949 Geneva Conventions (the only treaty series in the world to achieve this coveted status), the de-emphasis of reciprocity as a basis for an obligation to comply with the LOAC (famously reinforced by the International Criminal Tribunal for the former Yugoslavia in the *Kupreskic* case)¹²⁴ and the enhancement of legal “principles” (as opposed to treaties or customary international law which are predicated upon State consent) based upon “elementary consideration of humanity,”¹²⁵ morality¹²⁶ and interstitial norms¹²⁷ that have achieved greater sway in legal interpretation. Constructivism also provides an explanation for why LOAC treaty declarations and reservations are not, in practice, fully relied upon within interpretive approaches to LOAC. Additionally, as discussed above, under the means-ends rationality concept, it goes some way to explaining why, as a matter of “policy” overlay, a number of human rights norms within armed conflict find resonance, especially within the field of detention operations.

Constructivism, not surprisingly, provides the most comprehensive account of social agency among competing IR theories. Some see this as a two-step process of initial “role playing”¹²⁸ that then leads to an internalization of norms. Goodman and Jinks examine this further to differentiate between “persuasion,” a conscious acceptance of the merits of an idea, and “acculturation,” under which partial internalization occurs through the phenomena of sociological micro-processes of mimicry, orthodoxy, identification, status maximization and avoidance of cognitive dissonance.¹²⁹

Constructivism provides an explanation for why military forces can come to generate a level of self-identity from LOAC. Famously, during the Bush administration debates about the *de jure* application of the Geneva Conventions to the war in Afghanistan, the Chairman of the Joint Chiefs of Staff, General Myers, resisted their non-application, stating that “[t]he Geneva Conventions were a fundamental part of our military culture and every military member was trained on them. . . . Objectively applying the Conventions was important to our self image.”¹³⁰ This sentiment is echoed by other military members who asked who “owned” the Geneva Conventions, the civilian lawyers or the military.¹³¹ Plainly there was a level of deep cognitive dissonance that came from a perception of civilian technical legal manipulation. Such questioning suggests a strong sense of internalization of norms associated with the legal framework.

Constructivists also posit the view that their theory helps explain the non-use of nuclear and chemical weapons at times when their legality was still evolving and rationalist theories would have expected such use.¹³² While these theories may be overstated and fail to account for the types of means-end rationality arguments

outlined above, or more generally for simple military utility, they nonetheless do provide a credible basis to understand disposition. If, in fact, the military “owns” LOAC as many so perceive, then normative adherence has less to do with external legal controls than with an internal orientation of self-image. As such, arguments of legal propriety find a receptive audience in the military and permit a more nuanced view of the application of force. This does not deny the availability of fulsome legal arguments to ensure complete mission accomplishment. It does, however, allow for a “base” internal attitude toward legitimacy of action that has been accepted—one that is not oblivious to the significance of moral and social consequences concerning the application of force.

Virtue Ethics

Unlike deontology or utilitarianism, which are forms of external moral guidance “where [an] agent has to bring his will and action in line with universal moral laws . . . or to maximize the common good,”¹³³ virtue ethics deal with a deeply personal orientation toward living life. Of Aristotelian origin, virtue ethics are concerned with consistent personal examination of our own behavior. Mark Osiel notes that “virtue is a property of our character, not our relation to others, even if evidenced in such relations.”¹³⁴ Osiel points to a form of virtue ethics as the motivating factor that led a number of senior US judge advocates to resist some Bush administration policies which were thought to undermine a particular balance in the framework of LOAC.¹³⁵ The motivation was not necessarily based upon means-ends rationality, or even a conscious expression of internalized legal norms; rather they were motivated by a deeper sense of felt professional honor.

Interestingly, virtue ethics have been viewed as a more reliable basis for action than “altruistic obligations to others and braver than self-interest.”¹³⁶ Importantly, they represent something of a reversion to an aristocratic commitment of living a life based upon a sense of reflective equilibrium.¹³⁷ Critically, the motivation is not premised upon any sense of (human) rights discourse, but rather a reflection of personal integrity. Hence with respect to the Judge Advocate General’s (JAG) Corps approach to detainee operations, Osiel observes that the felt sentiment was that “the duties we owe to those we have detained as terror suspects should best be understood . . . as an inference from the duties we owe our fellow citizens to behave honorably, consistent with our identity as a people constitutively committed to the rule of law.”¹³⁸

The military is particularly susceptible to the agency of virtue ethics as codes of behavior and service values are ritually emphasized in all professional military organizations around the world. Moral courage, as much as physical courage, is highly prized, and heuristic devices that transmit and reinforce this virtue are

consistently deployed. As Osiel notes, one such shorthand expression is reflected in the oft-used statement “Marines don’t do that.”¹³⁹ Similarly, the line of a JAG Corps defender of a Guantanamo detainee, “It’s not about them, it’s about us,”¹⁴⁰ conveys the depth of this appeal to virtue ethics, as does the refrain “Lose Moral Legitimacy, Lose the War” outlined within the COIN manual.¹⁴¹ That this particular perspective should have explanatory power for choices made under the law is not all that surprising. The business of warfare is brutal and deeply intimate. Drawing upon a self-illuminated moral identity is, or should be, a necessary consequence of such decision making. It does necessarily inform decision making in a manner independent from means-ends rationality and constructivist internalization theories. Of course, targeting and other operational decision making has become highly bureaucratized¹⁴² and there is the sense of a loss of responsibility through the battery of iterated routines.¹⁴³ Yet, there is always space at the strategic, operational and tactical levels where independent judgment is exercised under LOAC and it is here, within those spaces, where virtue ethics have some explanatory power for decision making. As such, the recognition of virtue ethics as a motivating force within the military acts as a sort of default setting to counter lawfare strategies that aim to ignite overreaction and violation of moral standards.

Conclusion

The typical sentiment expressed when dealing with assertions of lawfare is that it is a pernicious tactic that exploits the vulnerabilities of “law-abiding” States. The fact is that the practice of law, including LOAC, has always taken place on a highly contested terrain of social and political norms. What the phenomenon of lawfare does is highlight the perceptions of the limitations under the positivist framework in addressing and countering its goals. All contemporary accounts of positivism today reveal a level of interpretive space where broader social and policy considerations can be infused into legal interpretation. It has been a strong theme of this article that the interpretive space is much broader than what might be imagined. Correlatively, it is also a theme that LOAC is more indeterminate than what might be hoped. Hence, whether reconciled as the interplay between law and policy, or being an interpretive act within Hart’s penumbral region, or representing a new format of legitimacy, the means exist by which the goals sought in a malevolent lawfare strategy can be decisively countered. Evidence of these opportunities already exists within the COIN and stability operations environment, but these new doctrines merely represent aspects of a broader reality about interpretive approaches.

In understanding the choices that are available to military legal officers when interpreting and applying the law, there are a number of factors that do get included in the decision-making calculus beyond mere textual excursus. Means-ends rationality and the role of public opinion have always been relevant considerations. In accepting this, legal analysis should borrow from IR theory to better understand the manner in which the law is used as part of political advocacy projects. Constructivism provides another explanatory theory for why normative features of the law are internalized and why there exists a strong sentiment that LOAC is “owned” by the military. Such an understanding assists in anticipating the margins of appreciation that may be at play when grappling with the decision-making processes under LOAC. Similarly, virtue ethics sometimes play an unconscious though vital part of the interpretive experience and permit a reliably professional assessment of law’s purpose in relation to military decision making.

The issue of equipoise between principles of military necessity and humanity remains central to the interpretive endeavor of LOAC. As a fundamental touchstone of every interpretive exercise in any register of approach is the observations of Professor Dinstein, who poignantly notes that

[e]very single norm of LOIAC [the law of international armed conflict] is moulded by a parallelogram of forces: it confronts a built-in tension between the relentless demands of military necessity and humanitarian considerations, working out a compromise formula. The outlines of the compromise vary from one LOIAC norm to another. Still, in general terms, it can be stated categorically that no part of LOIAC overlooks military requirements, just as no part of LOIAC loses sight of humanitarian considerations.¹⁴⁴

The expression of such a “categorical imperative” provides a critical foundation for directing the trajectory of any interpretive approach. While lawfare is derided as an unfair or malevolent means to an ulterior end, its recognition permits a deeper appreciation of the social and political context in which law is used to underpin military decision making. This requires that the inevitable moral and political dilemmas encountered in such decision making be consciously faced if legal advice is to be rendered meaningful. Central to this exercise is the critical need to balance military and humanitarian considerations, always and everywhere, as a matter of legal rectitude. It also prompts a necessary acknowledgment of the special role military lawyers have in dispensing advice under the law, in whose name they must always responsibly act.

Notes

1. Charles J. Dunlap Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts* (Carr Center for Human Rights, John F. Kennedy School of Government, Harvard University, Working Paper, 2001), available at <http://www.ksg.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf>.

2. Council on Foreign Relations, *Lawfare, the Latest in Asymmetries* (Mar. 18, 2003), summarized transcript of sixth session of FY03 National Security Roundtable, available at <http://www.cfr.org/publication.html?id=5772>.

3. Michael W. Lewis, *International Myopia: Hamdan's Shortcut to "Victory,"* 42 UNIVERSITY OF RICHMOND LAW REVIEW 687 (2008).

4. Brooke Goldstein, Opening Remarks at the Lawfare Conference (Mar. 11, 2010), available at <http://www.thelawfareproject.org/141/opening-remarks>.

5. Dunlap, *supra* note 1.

6. See, e.g., Dale Stephens, *UN Security Council and Maritime Zones*, in INTERNATIONAL LAW DEPARTMENT, US NAVAL WAR COLLEGE, MARITIME OPERATIONAL ZONES 5.1, 5.12–5.16 (2006).

7. Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 43 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 1 (2004).

8. Noting of course that Articles 1(4), 43 and 44 of Additional Protocol I provide arguable exceptions to this emphasis. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, reprinted in DOCUMENTS ON THE LAWS OF WAR 422 (Adam Roberts & Richard Guelff eds., 3d ed. 2000) [hereinafter GP I].

9. Eric Talbot Jensen, *The ICJ's "Uganda Wall": A Barrier to the Principle of Distinction and an Entry Point for Lawfare*, 35 DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY 241, 269 (2007).

10. Famously outlined in the United States' 2005 National Defense Strategy: "Our strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism." Department of Defense, *The National Defense Strategy of the United States* 5 (2005), available at <http://www.defense.gov/news/Mar2005/d20050318nds1.pdf>.

11. Jensen, *supra* note 9, at 269.

12. *Id.* at 269–70.

13. With regard to "Special Protection," The Commander's Handbook on the Law of Naval Operations provides: "Under the law of land warfare, certain persons, places, and objects enjoy special protection against attack. . . . [M]isuse of protected places and objects for military purposes renders them subject to legitimate attack during the period of misuse" and "Buildings devoted to religion, the arts, or charitable purposes; historic monuments; and other religious, cultural, or charitable facilities should not be bombarded, provided they are not used for military purposes." US Navy, US Marine Corps & US Coast Guard, *The Commander's Handbook on the Law of Naval Operations*, NWP 1-14M/MCWP 5-12.1/COMDTPUB P5800.7A ¶¶ 8.10.2, 8.9.1.6 (2007).

14. The issue of voluntary and involuntary shields is discussed in the commentary on the 2009 HPCR Manual where a differentiation between voluntary and involuntary human shields was made. While the status of voluntary human shields was debated in terms of whether such persons should be considered as taking a direct part in hostilities or not, and thus whether they can be excluded from any proportionality debate, there was "no dispute among the Group of

Experts that ‘involuntary human shields’ count as civilians in a proportionality analysis.” PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, COMMENTARY ON THE HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE 144, ¶¶ 5–7 (2010) [hereinafter HPCR MANUAL COMMENTARY].

15. GP I, *supra* note 8, Article 51(3) states, “Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.” Identical language appears in Additional Protocol II (changing only “Section” to “Part”) applicable to non-international armed conflicts. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 13(3), June 8, 1977, 1125 U.N.T.S. 609, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 8, at 483.

16. David B. Rivkin Jr. & Lee A. Casey, Opinion, *Lawfare*, WALL STREET JOURNAL, Feb. 23, 2007, at A11.

17. DAVID KILCULLEN, *THE ACCIDENTAL GUERRILLA* 30 (2009)

18. GP I, *supra* note 8, Article 52(2) provides:

Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

19. *Id.*, Article 52(1) provides: “Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.” (Paragraph 2 is set forth in the preceding endnote.)

20. KILCULLEN, *supra* note 17, at 38.

21. Michael Schmitt, *The Principle of Discrimination in 21st Century Warfare*, 2 YALE HUMAN RIGHTS AND DEVELOPMENT LAW JOURNAL 143, 170 (1998).

22. Charles Dunlap Jr., *A Virtuous Warrior in a Savage World*, 8 UNITED STATES AIR FORCE ACADEMY JOURNAL OF LEGAL STUDIES 71, 77 (1998).

23. Jim Molan, *Thoughts of a Practitioner*, AUSTRALIAN ARMY JOURNAL, Winter 2008, at 215, 217 (2008).

24. See, e.g., RONALD DWORKIN, *LAW’S EMPIRE* (1986).

25. See, e.g., Manley O. Hudson, *The Prospect for International Law in the Twentieth Century*, 10 CORNELL LAW QUARTERLY 419 (1925); Alejandro Alvarez, *The New International Law*, 15 TRANSACTIONS OF THE GROTIUS SOCIETY 35 (1930).

26. *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).

27. Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 78 (Feb. 14), *reprinted in* 41 INTERNATIONAL LEGAL MATERIALS 536, 585, ¶ 51.

28. H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994).

29. *Id.* at 185.

30. *Id.* at 89–91, 137–38.

31. *Id.* at 100–110.

32. *Id.* at 124–36.

33. *Id.* at 135.

34. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARVARD LAW REVIEW 593 (1957); Lon Fuller, *Positivism and Fidelity to Law – A Reply to Professor Hart*, 71 HARVARD LAW REVIEW 630 (1957).

35. Hart, *supra* note 34, at 626.

36. *Id.* at 620.

37. Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 NEW YORK UNIVERSITY LAW REVIEW 1109, 1114 (2008).
38. Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 MICHIGAN JOURNAL OF INTERNATIONAL LAW 345, 350 (1998).
39. Schauer, *supra* note 37, at 1119.
40. *Id.* at 1128.
41. Michael Mukasey, *The Role of Lawyers in the Global War on Terrorism*, 32 BOSTON COLLEGE INTERNATIONAL AND COMPARATIVE LAW REVIEW 179, 181 (2009).
42. *Id.* at 180.
43. Rosalyn Higgins, *Diverging Anglo-American Attitudes to International Law*, 2 GEORGIA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 1, 2–3 (1972).
44. Convention No. IV Respecting the Laws and Customs of War on Land pmbl., Oct. 18, 1907, 36 Stat. 2227, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 8, at 69.
45. Antonio Cassese, *The Martens Clause: Half a Loaf or Simply Pie in the Sky?*, 11 EUROPEAN JOURNAL OF INTERNATIONAL LAW 187, 208 (2000).
46. DAVID KENNEDY, INTERNATIONAL LEGAL STRUCTURES 256 (1987).
47. Oliver Wendell Holmes, *The Path of the Law*, 10 HARVARD LAW REVIEW 457, 460 (1897).
48. STEVEN L. WINTER, A CLEARING IN THE FOREST 202 (2001).
49. HART, *supra* note 28, at 126–27.
50. DUNCAN KENNEDY, LEGAL REASONING: COLLECTED ESSAYS 163–64 (2008).
51. *Id.* at 170.
52. Memorandum from John C. Yoo & Robert Delahunty to William J. Haynes II, General Counsel, Department of Defense, Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 9, 2002), *reprinted in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 38, 39, 50 (Karen J. Greenberg & Joshua Dratel eds., 2005) (“Afghanistan was without the attributes of statehood necessary to continue as a party to the Geneva Conventions, and the Taliban militia like al Qaeda, is therefore not entitled to the protections of the Geneva Conventions”).
53. *Id.* at 44.
54. *Id.* at 46.
55. *Id.* at 46, n.19.
56. Memorandum from William H. Taft IV, Legal Adviser, Department of State, to Counsel to the President, Comments on Your Paper on the Geneva Conventions (Feb. 2, 2002), *reprinted in* TORTURE PAPERS, *supra* note 52, at 129 (emphasis added).
57. *Id.*
58. Memorandum from George Bush to Vice President et al., Subject: Humane Treatment of Al Qaeda and Taliban Detainees (Feb. 7, 2002), *reprinted in* TORTURE PAPERS, *supra* note 52, at 135.
59. *Id.* at 134–35.
60. *Hamdan v. Rumsfeld*, 548 U.S. 557, 630 (2006).
61. *Reprinted in* Steven Solomon & David Kaye, *The International Law of Hamdan v Rumsfeld*, 8 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 179, 199 (2005).
62. A point advocated by Secretary of State Colin L. Powell in Memorandum from Colin L. Powell to Counsel to the President & Assistant to the President for National Security Affairs, Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan (Jan. 26, 2002), *reprinted in* TORTURE PAPERS, *supra* note 52, at 122 [hereinafter Powell Memorandum].
63. See Stuart Taylor Jr., *Order on the Court; Kagan may be to the right of Stevens on war powers. Why that won't matter much*, NEWSWEEK, July 5, 2010, at 44.

64. Powell Memorandum, *supra* note 62, at 123.

65. Typical of the broadness of this concept is the Australian declaration upon ratification of GP I, *supra* note 8, which stated:

In relation to paragraph 5(b) of Article 51 and to paragraph 2(a)(iii) of Article 57, it is the understanding of Australia that references to the “military advantage” are intended to mean the advantage anticipated from the military attack considered as a whole and not only from isolated or particular parts of that attack and that the term “military advantage” involves a variety of considerations including the security of attacking forces.

Available at <http://www.icrc.org/ihl.nsf/a/10312b4e9047086ec1256402003fb253?opendocument> (last visited July 13, 2010).

66. HPCR MANUAL COMMENTARY, *supra* note 14, Rule 22(a), states that “[t]he ‘nature’ of an object symbolizes its fundamental character. Examples of military objectives by nature include military aircraft . . . ; missiles and other weapons; military equipment; military fortifications” The commentary on the rule registers a disagreement between the majority of experts who drafted the Manual and International Committee of the Red Cross (ICRC) representatives on an extended range of objects that by their “nature” could also qualify as military objectives, including factories, lines and means of communication, energy-producing facilities, etc. The majority thought these could constitute military objectives by their “nature” depending on circumstances ruling at the time, whereas the ICRC representatives considered that “nature” indicated a permanent condition. *Id.* at 109, n.261.

67. The war-fighting/war-sustaining criteria for rendering an object liable to attack is a position reflected in US manuals. See, e.g., The Commander’s Handbook, *supra* note 13, ¶ 8.2, which states, “Military objectives are those objects which, by their nature, location, purpose or use, effectively contribute to the enemy’s war-fighting or war-sustaining capability.” Contrast this to GP I, *supra* note 8, Article 52(2), which is narrower in its focus, stating that “military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action.”

68. See, e.g., UNITED KINGDOM MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT ¶ 13.47a (2004), which provides,

Merchant vessels flying flags of neutral states may only be attacked if they fall within the definition of military objectives. They may, depending on the circumstances, become military objectives if they . . . are believed on reasonable grounds to be carrying contraband or breaching a blockade, and after prior warning they intentionally and clearly refuse to stop, or intentionally and clearly resist visit, search, or capture.

69. *Id.*, ¶ 13.67 reflects the international rule that “[a] blockade must be effective. The question whether a blockade is effective is a question of fact.” In view of the ability to attack vessels that breach a blockade, it becomes paramount to determine whether in “fact” a blockading belligerent’s military assets are capable of reducing access to a geographic area. Similarly, in the air warfare context, the HPCR MANUAL COMMENTARY, *supra* note 14, at 293, in commenting on Rule 154 provides a greater level of clarity by distinguishing between air supremacy and air superiority when determining that a “sufficient degree” of the latter may suffice for demonstrating “effectiveness” but refrains from providing any greater specificity on the criteria that would establish “effectiveness.” Since it is these criteria that would allow for the application of lethal force and qualifies an attack as not a grave breach, such criteria are of critical importance.

70. HPCR MANUAL COMMENTARY, *supra* note 14, Rule 8, provides, “There is no specific obligation on Belligerent Parties to use precision guided weapons. There may however be situations in which the prohibition of indiscriminate attacks, or the obligation to avoid—or, in any

event, minimize—collateral damage, cannot be fulfilled without using precision guided weapons.” While undoubtedly a correct statement of the law, it demonstrates, again, how case-specific “judgment” is the decisional criterion.

71. Professor Dinstein notes that there has always been a fundamental disconnect in balancing military considerations against civilian losses, because they are “dissimilar considerations.” YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 122 (2004). Similarly, Major General Rogers notes that “[t]he rule is more easily stated than applied in practice.” A.P.V. ROGERS, *LAW ON THE BATTLEFIELD* 20 (2d ed. 2004).

72. DAVID KENNEDY, *OF WAR AND LAW* 144 (2006).

73. Holmes, *supra* note 47, at 61 (“the object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts”).

74. Hersch Lauterpacht, *The Problem of the Revision of the Law of War*, 29 *BRITISH YEARBOOK OF INTERNATIONAL LAW* 360, 382 (1952).

75. DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* 284 (2004).

76. Roger Normand & Chris af Jochnick, *The Legitimation of Violence: A Critical Analysis of the Gulf War*, 35 *HARVARD INTERNATIONAL LAW JOURNAL* 387 (1994).

77. Charles J. Dunlap Jr., *Lawfare: A Decisive Element of 21st Century Conflicts?*, 54 *JOINT FORCE QUARTERLY* 34 (2009) (“What was the U.S. military’s most serious setback since 9/11? Few knowledgeable experts would say anything other than the detainee abuse scandal known as ‘Abu Ghraib.’ That this strategic military disaster did not involve force of arms, but rather centered on illegalities, indicates how law has evolved to become a decisive element—and sometimes *the* decisive element—of contemporary conflicts.”).

78. Roger Boyes, *Angela Merkel on Defensive after Afghan Tanker Attack Blunder by German Forces*, *TIMESONLINE* (Sept. 9, 2009), <http://www.timesonline.co.uk/tol/news/world/europe/article6826088.ece> (“It was the end of Germany’s ‘Don’t Mention the War’ election campaign. In an impassioned parliamentary session yesterday Angela Merkel, the Chancellor, was forced to fight off her critics and try to persuade a sceptical nation that German troops should stay in Afghanistan.”).

79. David Kennedy, *Modern War and Modern Law*, 36 *UNIVERSITY OF BALTIMORE LAW REVIEW* 173, 177 (2007).

80. KENNEDY, *supra* note 72, at 96–97.

81. David Kennedy, *Getting Beyond Modern War and Modern Law* 5 (Paper presented in Cambridge, United Kingdom, Feb. 2010) (on file with the author).

82. See generally THOMAS FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990).

83. See generally Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *YALE LAW JOURNAL* 2599 (1997); Harold Hongju Koh, *Transnational Legal Process*, 75 *NEBRASKA LAW REVIEW* 181 (1996).

84. Ian Johnstone, *Security Council Deliberations: The Power of the Better Argument*, 14 *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 437, 440–43 (2003).

85. *Id.*

86. *Id.* at 449.

87. Dencho Georgiev, *Politics or Rule of Law: Deconstruction and Legitimacy in International Law*, 4 *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 1, 13 (1993).

88. *Id.* at 14.

89. Oscar Schachter, *International Law in Theory and Practice, General Course in Public International Law*, 1978 *RECUEIL DES COURS* 9, 45 (1982).

90. Frits Kalshoven, *The Respective Roles of Custom and Principle in the International Law of Armed Conflict*, 2 ACTA SOCIETATIS MARTENSIS 48, 59 (2006).
91. *Id.* at 67.
92. See generally Brian Leiter, *American Legal Realism*, in PHILOSOPHY OF LAW AND LEGAL THEORY 50 (Martin P. Golding & William A. Edmundson eds., 2005).
93. NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 93–96, 126–34 (1997).
94. Joe Klein, *The Return of the Good Soldier*, TIME, July 1, 2010, at 28.
95. HEADQUARTERS, DEPARTMENT OF THE ARMY & HEADQUARTERS, MARINE CORPS COMBAT DEVELOPMENT COMMAND, FM 3-24/MCWP 3-33.5, THE U.S. ARMY/MARINE CORPS COUNTERINSURGENCY FIELD MANUAL xxi (University of Chicago Press 2007) (2006) [hereinafter COIN MANUAL].
96. *Id.* at 48, ¶ 1-149.
97. *Id.* at 49, ¶ 1-153.
98. *Id.* at 48, ¶ 1-150.
99. *Id.* at 48–49, ¶ 1-151.
100. *Id.* at xxv (“[t]he real battle is for civilian support for, or acquiescence to, the counterinsurgents and host nation government. The population waits to be convinced. Who will help them more, hurt them less, stay the longest, earn their trust?”).
101. MNF-I Commander’s Counterinsurgency Guidance (June 21, 2008), reprinted in THOMAS E. RICKS, THE GAMBLE 369 (2009), available at http://www.mnf-iraq.com/images/CGs_Messages/080621_coin_%20guidance.pdf.
102. COIN MANUAL, *supra* note 95, at 247–48.
103. *Id.* at 249.
104. A random sample includes Gavin Reynolds, *Embracing Complexity: An Adaptive Effect Approach to the Conflict in Iraq*, AUSTRALIAN ARMY JOURNAL, Summer 2006, at 129; John Kiszely, *Post-Modern Challenges for Modern Warriors*, AUSTRALIAN ARMY JOURNAL, Winter 2008, at 177; Roger Noble, “Beyond Cultural Awareness”: *Anthropology as an Aid to the Formulation and Execution of Military Strategy in the Twenty-First Century*, AUSTRALIAN ARMY JOURNAL, Winter 2009, at 65. A more strategic military/diplomatic view that adopts a constructivist model of international relations theory is Mark Hinchcliffe, *Soft Power and the Role of the ADF in Shaping the Australian Security Environment*, AUSTRALIAN DEFENCE FORCE JOURNAL, July–Aug. 2009, at 4.
105. Joseph William Singer, *Legal Realism Now*, 76 CALIFORNIA LAW REVIEW 467 (1988).
106. Jack Goldsmith, *Sovereignty, International Relations Theory, and International Law*, 52 STANFORD LAW REVIEW 959, 984 (2000) (reviewing STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY (1999)).
107. *Id.*
108. *Id.* at 980
109. BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS 150 (2009).
110. *Id.* at 148.
111. *Id.* at 144.
112. MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS 16–37 (1998).
113. *Id.* at 17.
114. *Id.* at 16.
115. Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 2056 U.N.T.S. 211.
116. KECK & SIKKINK, *supra* note 112, at 27.

117. Michael Hatfield, *Fear, Legal Indeterminacy, and the American Lawyering Culture*, 10 LEWIS AND CLARK LAW REVIEW 511, 521 (2006).
118. David Graham, *A Long, Hard Fall from the Pedestal*, 54 JOINT FORCE QUARTERLY 30, 31 (2009).
119. *Id.*
120. Goldsmith, *supra* note 106, at 985.
121. See generally Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE LAW JOURNAL 621 (2004).
122. Jeffrey T. Checkel, *The Constructivist Turn in International Relations Theory*, 50 WORLD POLITICS 324, 326 (1998); see also Ryan Goodman & Derek Jinks, *Toward an Institutional Theory of Sovereignty*, 55 STANFORD LAW REVIEW 1749, 1752; Goldsmith, *supra* note 106, at 965.
123. Goodman & Jinks, *supra* note 122, at 1755.
124. Prosecutor v. Kupreskic, Case No. IT-95-16-T, Judgment, ¶ 518 (Int'l Crim. Trib. for the Former Yugoslavia, Jan. 14, 2000).
125. Referenced in Corfu Channel (U.K. v. Alb.), 1949 I.C.J., 4, 22 (Apr. 9); Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 112 (June 27); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 95 (July 8).
126. Kalshoven, *supra* note 90, at 67.
127. Vaughn Lowe, *The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?*, in THE ROLE OF LAW IN INTERNATIONAL POLITICS 207–26 (Michael Byers ed., 2000).
128. Jeffrey T. Checkel, *International Institutions and Socialization in Europe: Introduction and Framework*, 59 INTERNATIONAL ORGANIZATION 801, 810 (2005).
129. Goodman & Jinks, *supra* note 121, at 638.
130. RICHARD MYERS, EYES ON THE HORIZON 203 (2009).
131. MARK OSIEL, THE END OF RECIPROCITY 335 (2009) (“In conversations among themselves, JAGs sometimes speak in candidly guild-like terms. ‘Who owns the law of war?’ rhetorically asks former My Lai prosecutor William Eckhardt at one such gathering. ‘We do: the profession of arms,’ he immediately answers. ‘It’s time to take it back,’ he adds, alluding to the Office of Legal Counsel’s temporary, recent hijacking of the field.”).
132. Richard Price & Nina Tannenwald, *Norms and Deterrence: The Nuclear and Chemical Weapons Taboos*, in THE CULTURE OF NATIONAL SECURITY 114–52 (Peter Katzenstein ed., 1996).
133. Th. A. van Baarda, *Moral Ambiguities Underlying the Laws of Armed Conflict: A Perspective from Military Ethics*, 11 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 3, 17 (2008).
134. OSIEL, *supra* note 131, at 352.
135. *Id.* at 329–61.
136. *Id.* at 344 (quoting Sharon Krause).
137. *Id.* at 371.
138. *Id.* at 359.
139. *Id.* at 334.
140. *Id.* at 330 (words of Lieutenant Commander Charles Swift, Salim Ahmed Hamdan’s defense counsel).
141. COIN MANUAL, *supra* note 95, at 252.
142. See generally Michael Lewis, *The Law of Aerial Bombardment in the 1991 Gulf War*, 97 AMERICAN JOURNAL OF INTERNATIONAL LAW 481 (2003).
143. KENNEDY, *supra* note 72, at 168–69.
144. DINSTEIN, *supra* note 71, at 17.

XIV

Warning Civilians Prior to Attack under International Law: Theory and Practice

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A primary goal of the modern law of armed conflict (also known as international humanitarian law) is to protect civilians as much as possible from the violent consequences of hostilities. Accordingly, the law of armed conflict requires that the parties to a conflict apply certain precautionary measures in order to minimize incidental injury to civilians resulting from military attacks. One of these precautionary measures is the provision of warnings to civilians prior to an attack. This article will deal with this measure, and examine both theoretical and practical aspects of providing advance warnings of attacks.

During World War II there were instances when civilians were warned prior to an attack. Advance warnings were also provided during other armed conflicts throughout the second half of the twentieth century; however, the amount, scope and specificity of warnings issued to civilians have dramatically increased in the conflicts fought since the beginning of this century. Probably the most elaborate and systematic warnings were issued by Israel in its conflict in Lebanon in 2006 and

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especially in its operation in the Gaza Strip in 2009. This article explores the legal boundaries of the obligation to issue warnings to civilians prior to attack. Does the recent practice of Israel and other States result from legal obligations or is it a reflection of self-imposed restrictions? What are the elements a warning should fulfill in order to meet the legal requirements?

Section I briefly reviews the legal framework of the obligation to give warnings prior to an attack, its historical development and the manner with which it is dealt in military manuals. In section II, State practice will be examined, with a focus on Israeli practice. Based on these two sections, section III will analyze the different legal aspects of the obligation. Finally, the article will end with our conclusion as to both the legal and practical issues associated with advance warnings.

This article is written from the viewpoint of practitioners faced with the practical aspects of the issue at hand and is based on personal experience. Hopefully, it will serve as a useful tool to those facing similar dilemmas, as well as to those evaluating the performance of others.

I. The Duty to Give Prior Warning: The Legal Basis

A. Historical Development

The requirement to give, in certain circumstances, advance warning prior to an attack that may affect the civilian population appears in the earliest codifications of the law governing the conduct of hostilities. Thus, we find the following instruction in Article 19 of the Lieber Code of 1862:

Commanders, whenever admissible, inform the enemy of their intention to bombard a place, so that the noncombatants, and especially the women and children, may be removed before the bombardment commences. But it is no infraction of the common law of war to omit thus to inform the enemy. Surprise may be a necessity.¹

Article 19 acknowledges that there may be situations when it is justified not to give a warning, as when it is necessary to enable surprising the enemy.

The Lieber Code influenced the language of the Brussels Declaration of 1874, which stated in Article 16 that “if a town or fortress, agglomeration of dwellings, or village, is defended, the officer in command of an attacking force must, before commencing a bombardment, except in assault, do all in his power to warn the authorities.”² Unlike the Lieber Code, the Brussels Declaration is directed to the officer in command of an attacking force and not to commanders in general. It also specifies that the warning must be given to the “authorities.” Similar language

appears in the *Laws of War on Land* published by the Institute of International Law in 1880 (known also as the *Oxford Manual*).³

Article 26 of the Regulations annexed to the 1907 Hague Convention IV contains wording that is almost identical to that of the Brussels Declaration: "The Officer in Command of an attacking force must, before commencing a bombardment, except in the case of an assault, do all in his power to warn the authorities."⁴ The term "assault" refers to surprise attacks, regarding which there is no obligation to warn in advance.⁵

Article 6 of the 1907 Hague Convention IX Concerning Bombardment by Naval Forces in Time of War also refers to the duty to issue warnings prior to attacks.⁶ Conversely, the draft Air Warfare Rules of 1923 did not refer to warnings,⁷ which suggests that at that period of time no similar rule existed with regard to aerial bombardment.⁸

The implementation of the obligation to issue warnings prior to an attack created little difficulty in earlier eras when attacks likely to seriously affect the civilian population came from artillery, usually in a siege operation. In such a context, since the authorities of the besieged area had no practical means of protecting the military objectives being targeted, surprise was not required and attacking troops had little problem in giving an advance warning;⁹ however, when attacks through aerial bombardment commenced early in the twentieth century, surprise was considered a critical condition for success. As a consequence, as reflected by the absence of a warning provision in the 1923 Air Warfare Rules, apparently no rule existed at that time requiring warnings prior to aerial attacks. Rogers indicates that when the International Committee of the Red Cross (ICRC) was preparing its report to the Conference of Government Experts in 1971, a majority of experts felt that the rule regarding warning "had fallen into disuse."¹⁰

B. Current Legal Framework

Today there is widespread acceptance that the rule laid down in the 1907 Hague Regulations reflects customary international law.¹¹

B.1. The 1977 Additional Protocols and the Duty to Give Warnings

The duty to give warnings prior to attack is addressed in Article 57(2)(c) of Additional Protocol I of 1977, dealing with precautions in attack. The article provides, "Effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit."¹² The article was adopted with ninety votes in favor, none against and four abstentions at the diplomatic conference that negotiated the Protocol.¹³ No relevant reservations were made regarding

it.¹⁴ This article reflects, in essence, a rule existing in customary international law.¹⁵ We will analyze the components of the customary norm below.

Article 57(2)(c) refers only to warning of “attacks” and, therefore, does not demand warnings prior to “military operations” that are not attacks.¹⁶ It does not, however, distinguish among land, naval and aerial attacks so long as they are carried out against objectives on land.¹⁷ As for warnings with regard to attacking vessels at sea and aircraft, there are special rules that will not be discussed in this article.¹⁸

Additional Protocol II of 1977, dealing with non-international armed conflict,¹⁹ does not include an obligation to issue warnings prior to an attack;²⁰ however, the ICRC study *Customary International Humanitarian Law (CIHL)* states that the obligation to issue a warning prior to attack also applies in non-international armed conflict.²¹ This article will address advance warnings only in the context of international armed conflict; the *de jure* applicability of the rule in non-international armed conflicts will not be analyzed.

The recently published manual on air and missile warfare (*AMW Manual*)²² deals with the duty to issue warnings when attacking ground targets by air or missile operations in rule 37:

When the attack of a lawful target by air or missile combat operations may result in death or injury to civilians, effective advance warnings must be issued to the civilian population, unless circumstances do not permit. This may be done, for instance, through dropping leaflets or broadcasting the warnings. Such warnings *ought to be as specific as circumstances permit*.²³

B.2. Other Obligations to Issue Warnings Prior to Attack

The law of armed conflict also includes an obligation to give specific advance warnings before attacking persons and objects entitled to specific protection.²⁴ These include civilian hospitals,²⁵ medical units,²⁶ hospital ships,²⁷ civilian medical units,²⁸ civil defense personnel and material,²⁹ and cultural property.³⁰ The purpose of the warning in these instances is to provide the enemy the opportunity to put an end to the misuse of such personnel and objects in order to avoid the need to attack them.³¹ Accordingly, the *AMW Manual* stipulates that such warnings should include a time limit within which to redress the situation to the extent that the circumstances permit.³²

Reference to warnings appears also in the amended Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II to the Convention on Certain Conventional Weapons).³³ Additionally, as indicated above, there are also special rules about warning vessels and aircraft in the context

of surface warfare at sea and of aerial operations.³⁴ This article will not address these specific types of warning.

Finally, warnings usually constitute part of the rules of engagement issued to ground forces involved in law enforcement missions. For example, while trying to arrest a suspect, the arresting power might have a duty to warn the suspect before using lethal force through verbal warnings and warning shots. This article will focus, however, only on warnings during armed conflict.

C. Military Manuals

An obligation to give warnings prior to attacks appears in many military manuals, including the most recent.³⁵ Examples include the following.

- The US Army's *Operational Law Handbook*, published in 2010, provides:

The general requirement to warn before a bombardment only applies if civilians are present. Exception: if it is an *assault* (any attack where surprise is a key element), no warning need be given. Warnings need not be specific as to time and location of the attack, but can be general and issued through broadcasts, leaflets, etc.³⁶

- Paragraph 8.9.2 of the US Navy's *The Commander's Handbook on the Law of Naval Operations*, which was issued in 2007, under the heading "Warning before Bombardment" states, "Where the military situation permits, commanders should make every reasonable effort to warn the civilian population located in close proximity to a military objective targeted for bombardment. Warnings may be general rather than specific lest the bombarding force or the success of its mission be placed in jeopardy."³⁷

- Article 5.32.8 of the United Kingdom's *The Manual of the Law of Armed Conflict* (2004) provides:

There is a duty to give advance warning of an attack that "may" affect the civilian population, unless circumstances do not permit. Obviously, the point does not arise as a matter of law if military operations are being conducted in an area where there is no civilian population or if the attack is not going to affect the civilian population at all. In other cases, the warning must be given in advance and it must be effective. The object of the warning is to enable civilians to take shelter or leave the area and to enable the civil defense authorities to take appropriate measures. To be effective the warning must be in time and sufficiently specific and comprehensive to enable them to do this . . .³⁸

- Article 551 of Australia's 1994 *Defense Force Manual* provides:

When a planned attack is likely to affect the civilian population, those making the attack are required to give, if practicable, effective advance warning of the attack to the authorities or civilian population. This requirement must obviously be applied in a commonsense manner in light of all other factors. If the proposed action is likely to be seriously compromised by a warning then there is no requirement to provide any warning.³⁹

- Article 420 of Canada's manual *Law of Armed Conflict at the Operational and Tactical Levels* (2001) states, "An effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit such a warning to be given. For tactical reasons, an attacking force may not give a warning in order to maintain the element of surprise."⁴⁰

- Article 1.4 of France's LOAC Summary Note of 1992 states, "If the military mission allows for it, appropriate warning must be given to the civilian population to give it time to seek shelter."⁴¹

Additional examples appear in volume II of the ICRC's customary international law study.⁴²

II. State Practice

This section includes under the heading "General Practice" several examples of State practice on warnings prior to attack.⁴³ It should be kept in mind that this is only a brief account of these examples and does not purport to be a comprehensive or exhaustive record of such practice. The second part, "Israeli Practice," is a more detailed description of Israeli practice with regard to warnings prior to attack, particularly in the Lebanon War of 2006 and in the operation in the Gaza Strip in 2008–9.

A. General Practice

A.1. World War II

During World War II, warnings generally were not given prior to aerial attacks conducted in enemy territory.⁴⁴ In a US Air Force pamphlet it is explained that practice was lax on warnings, "because of the heavily defended nature of the targets attacked as well as because of attempts to conceal targets."⁴⁵ The Air Force did give general warnings by dropping leaflets listing cities that would be bombed. The listed cities were indeed subsequently bombed.⁴⁶

There were, however, also examples of cases where specific warnings were given, to include the warning given in 1945 to the German commander of Münster that

the city was about to be bombarded if he did not surrender.⁴⁷ A warning was also given ninety minutes prior to a US attack on the Skoda armament works in Czechoslovakia.⁴⁸ Another example is the warning to the Japanese authorities before the use of the atomic bomb against Hiroshima.⁴⁹

In other cases, particularly when the objective was situated in occupied territory, warnings were made by radio or by means of pamphlets.⁵⁰ There were also cases in which aircraft flew at a very low altitude over the objective, giving civilians, workers or townspeople time to leave.⁵¹ It seems, however, that when warnings were given during World War II, especially with regard to aerial attacks, this was not necessarily done out of a sense of obligation, but rather in order to induce the opposing belligerent to surrender or to avoid further escalation that would result from large numbers of civilian casualties.

A.2. Korean War

During the Korean War of 1950 to 1953, warnings prior to aerial bombardments were sometimes issued by UN forces.⁵² For example, a warning was broadcast by the United Nations Command to the civilian population of North Korea asking residents to leave any areas where there were military targets. The warning listed the objects that were considered military targets, including railroads, bridges and power plants.⁵³ In addition, United Nations Command forces often dropped leaflets telling the enemy the towns it was about to bomb.⁵⁴ According to the report of the United States in the *CIHL*, the warnings given in the Korean War were general in their terms, such as advising civilians to avoid war-supporting industries, "in order not to alert the air defense forces of an impending attack on a specific target."⁵⁵

A.3. The Conflict in the Federal Republic of Yugoslavia (FRY)

In some cases NATO issued warnings prior to attacks during Operation Allied Force's bombing campaign over the territory of the FRY in 1999.⁵⁶ Notwithstanding this fact, in its report on the operation, Amnesty International claimed there was "a consistent failure to give effective warning to civilians."⁵⁷

The incident which attracted the most attention concerning the issue of warnings was the bombing of the building housing the television and radio station in Belgrade on April 23. According to the final report to the prosecutor reviewing the NATO bombing campaign,⁵⁸ evidence concerning the warning given prior to this attack is somewhat contradictory. On one hand, NATO officials in Brussels are alleged to have told Amnesty International that they did not give a specific warning, because it would have endangered the pilots.⁵⁹ On the other hand, foreign media representatives were apparently forewarned of the attack. In addition, apparently a warning was received by Yugoslav authorities eleven days prior to the attack; as a

result some Yugoslav officials may have expected that the building was about to be struck. The report to the prosecutor concludes:

Although knowledge on the part of Yugoslav officials of the impending attack would not divest NATO of its obligation to forewarn civilians under Article 57(2), it may nevertheless imply that the Yugoslav authorities may be partially responsible for the civilian casualties resulting from the attack and may suggest that the advance notice given by NATO may have in fact been sufficient under the circumstances.⁶⁰

According to some critics, warning the foreign journalists to stay away from the site was not sufficient to meet the requirement of informing the Yugoslav authorities of an attack.⁶¹ In addition, it is argued that the warning to the Yugoslav authorities was not effective since the attack took place eleven days later and by that time the threat was no longer perceived as plausible, leading civilians to be present in the building at the time of the attack.⁶²

A.4. NATO in Afghanistan

During the military operations in Afghanistan that began in 2001 and have continued to the present, NATO forces have routinely issued general warnings to the civilian population prior to attack.⁶³ Additionally, according to different reports, such as those issued by Amnesty International, in some circumstances, NATO aircraft in Afghanistan fly close to targets or shoot warning rounds to move civilians away from a potential target.⁶⁴

A.5. Coalition Forces in Iraq

According to reports, during Operation Iraqi Freedom coalition forces routinely dropped leaflets from the air advising Iraqi civilians of pending attacks.⁶⁵ By the end of April 2003, 31,800,000 leaflets had been dropped, according to US Army figures.⁶⁶ It should be noted, however, that while some of the leaflets focused on warning civilians to stay away from military targets,⁶⁷ many were part of a psychological warfare campaign aimed at civilians and soldiers and were meant to turn them against Saddam Hussein and his regime.⁶⁸

A.6. Russia-Georgia Conflict (2008)

The Independent International Fact-Finding Mission on the Conflict in Georgia issued its report on the conflict in September 2009.⁶⁹ The report is comprehensive, but it is unclear if and when warnings were given prior to attacks. The report does refer to a few specific cases regarding warnings.

First, the report mentions positively the warnings given by the Republic of Abkhazia authorities to the civilian population of the upper Kodori Valley, who, immediately before the military operation began, received many warnings on the preparations and execution of the military operation planned in that area and were provided with a humanitarian corridor so that they could leave the area of hostilities.⁷⁰

The report is less content with the practice of the Georgian forces, which used smoke grenades to warn the population before artillery shelling. The report claims that this falls short of giving an effective advance warning, though no analysis is provided. The report finds the fact that Georgian authorities declared a three-hour unilateral ceasefire to allow the remaining civilians in Tskhinvali to leave the conflict area by moving in a southern direction does not fulfill their obligation to take all feasible measures. This contention seems linked to the finding that when the nighttime offensive on Tskhinvali was carried out, no general advance warning was provided to the remaining population.⁷¹

It is interesting to note that in that portion of the report where Russia's description of the precautions its forces took in the course of the conflict is quoted, warnings are not mentioned.⁷²

B. Israeli Practice

B.1. Lebanon

During the operations in Lebanon in 1982 and 1996, warnings were given by Israel to the civilian population of southern Lebanon prior to attacks through the distribution of leaflets and via radio and loudspeakers, as well as by telephone calls.⁷³

When the Second Lebanon War broke out in 2006, Israeli authorities stressed the importance of warning the civilian population to stay away from areas of combat in order to avoid as much as possible civilian casualties.⁷⁴ Different warnings were given in different phases of the attack, as will now be described.⁷⁵

The first aerial bombardment by Israel was a surprise attack carried out on the night of July 12, 2006. Its aim was to destroy the long-range rockets of Hezbollah. Israel had managed in the years before the war to acquire accurate intelligence as to the location of Hezbollah's long-range rockets (Fajar rockets), which were limited in number and had the capability of reaching the center of Israel's most populated areas. The opening strike in the war was directed at these storage places, which were, for the most part, residential buildings. Prior to these attacks no warning was given, as surprise was crucial in order to prevent the relocation of the weapons to new, unknown locations. The main deliberations prior to the attacks focused on the proportionality analysis, as many civilians were expected to be killed or

wounded in these attacks. This was weighed against the substantial military advantage anticipated from the attack.⁷⁶

During the next several weeks Israel continued with its aerial operations, as well as some naval operations, and also commenced a ground operation. At this stage, Israel gave general warnings to civilians in specific areas of southern Lebanon, advising them to evacuate the area to places north of the Litani River in order to protect themselves from impending attacks expected in those areas.⁷⁷ Additionally, similar warnings were given to villages from which missiles were actually being launched toward Israel and to villages and specific areas in which military objects, such as weapon depots and Hezbollah headquarters, were located (for example, the Dahiya district in Beirut).

The warnings were given through four main methods: leaflets dropped by aircraft, recorded Arabic messages to telephones, messages on an Arabic-speaking radio station broadcasting from Israel, and telephone conversations with *mukhtars* (local leaders), mayors and community leaders.⁷⁸ The warnings were intended to provide civilians with a reasonable period of time for evacuation, during the course of which travel would be relatively safe and strikes in the evacuation routes would be avoided (unless the target was time sensitive, such as, for example, when rockets were fired toward Israel and there was a need to prevent such fire from continuing). In addition, the Israel Defense Forces (IDF) gave general warnings advising civilians to avoid places in which Hezbollah operated. One such leaflet, out of 510,000 dropped on the afternoon of July 16 over Sidon, Tyre and Beirut, read as follows (originally in Arabic):⁷⁹

To the residents of Lebanon

To protect the citizens of the State of Israel, the IDF will continue its operations in Lebanon against Hezbollah's unbridled and continuing terrorist attacks.

For your own safety, and because of our desire to prevent harm from coming to uninvolved civilians, you should avoid places where Hezbollah is located and from which it operates against the State of Israel.

Such places are:

- Locations from which rockets are launched at Israeli territory
- Storehouses of ammunition and military equipment belonging to Hezbollah

- Hezbollah centers in south Beirut and regions in south Lebanon under Hezbollah control
- Beirut's southern suburb [Dahiya] which is the terror center

The IDF calls upon the residents of Lebanon and the Lebanese army to avoid extending direct or indirect aid to Hezbollah elements. Anyone who does so endangers his own life.

You should know that the continuation of terrorism against Israel will prevent you from having a better life in the future

The State of Israel

Warnings to civilians in specific villages were repeated several times in order to make sure that civilians were aware of the need to evacuate the area.⁸⁰ Following the comprehensive warning campaign a vast majority of the civilian residents of south Lebanon left and headed north, although some civilians did stay behind.⁸¹

The Israeli operation in Lebanon was subject to critical review in two reports prepared by missions sent by UN human rights bodies (hereinafter the UN Reports on Lebanon or the Reports).⁸² One of the reports admitted that the warnings "certainly saved many lives, both in south Beirut and south of the Litani River."⁸³ Nevertheless, the Reports also included criticism of the warnings given by Israel during the military operation. An analysis of the legal standards applied by the Reports is made in section III.

B.2. Israeli Practice in the Gaza Strip (2000 to the Present)

In the autumn of 2000 there was an outbreak of hostilities between Israel and Palestinian armed groups in the West Bank and the Gaza Strip. In the years that followed, the IDF carried out aerial operations against targets located in these areas, such as weapon depots, military headquarters and tunnels used for smuggling of weapons.⁸⁴

Prior to aerial operations against such targets, Israel developed a practice of giving a general warning by pamphlets to residents of buildings housing such military infrastructure to stay away. In addition, specific and precise warnings by phone were provided to the inhabitants of the location immediately prior to the attack.⁸⁵ The aim was to enable the civilians to leave before the planned attack; however, in a few cases civilians being warned chose not to heed these warnings and instead were even joined by others coming to shield the house from attack. This led to the addition of further steps of giving further warning by phone calls and eventually of

firing warning shots using small munitions aimed at the roofs of the designated targets used in such cases.⁸⁶

When the operation in Gaza commenced in December 2008, Israel was faced with the difficult task of carrying out extensive military operations in a small area—one of the most densely populated in the world—where there was widespread intermingling of hostile forces with the civilian population.⁸⁷ Accordingly, in order to minimize civilian casualties as much as possible, Israel employed substantial efforts and various means to warn civilians of impending operations. This extensive system of operations is described in an Israeli official publication as follows:⁸⁸

First, general warnings were used, calling on civilians to stay away from sites where Hamas was conducting combat activities. In addition, regional warnings were distributed in certain areas, calling on civilians to leave those areas before IDF forces operated in them. Efforts were made to include in these warnings sufficient information to the residents, including a timeframe for the evacuation and designated specific routes for this purpose leading to safe areas. Far from having no place to flee, residents could—and the vast majority did—move to safe locations. Finally, specific warnings were issued to residents of particular buildings before attack.

Throughout the Gaza Operation, the IDF employed a variety of methods to communicate warnings effectively. The warning techniques included:

- *Radio Broadcasts and Phone Calls:* The IDF conveyed instructions and advance warnings to residents by local radio broadcasts with IDF announcements and by about 165,000 phone calls. This involved specific notices as well as a daily news broadcast (the latter from 31 December onwards).
- *Dropping of Leaflets:* During the Gaza operation, the IDF dropped a total of some 2,500,000 leaflets of various kinds in the Gaza Strip. Some of the leaflets warned civilians to distance themselves from military targets, including buildings containing weapons, ammunitions or tunnels, or areas where terrorist activity was being conducted. Other leaflets directed residents to leave a particular location and move to a safe zone by a certain route and within a defined period of time. Such leaflets were distributed, for instance, in the northern Gaza neighbourhood of Sajaiya.^[89] While warnings were a significant tool to reduce the likelihood of civilian casualties, IDF forces did not consider the distribution of leaflets alone as sufficient to presume the absence of civilians at the relevant locations.
- *Specific Warnings Before Attacks:* In addition to the above, the IDF made specific telephone calls just before an attack was about to take place, informing residents at risk about the upcoming strike and urging them to leave the place. In certain instances, although such warnings were made, the civilians chose to stay. In such cases, the IDF

made even greater efforts to avoid civilian casualties and minimise collateral damage by firing *warning shots from light weapons that hit the roofs* of the designated targets, before proceeding with the strike. These warnings were accompanied by real-time surveillance in order to assess the presence of civilians in the designated military target, despite the advance warnings. Accordingly, the commander in charge assessed whether the collateral damage anticipated, including to those who chose to stay at the premises, was not excessive in relation to the military advantage anticipated. The specific warnings were generally effective. Several such incidents are discussed in Section V.D(2), including one in which all residents of a four-story apartment building safely evacuated following a series of warnings, and another in which surveillance confirmed the evacuation of a group of residents, although apparently one family remained despite the extensive warnings.

The Israeli report concludes that

[w]hile the warning systems implemented by the IDF did not provide a 100 percent guarantee against civilian casualties, they were, in fact, highly effective. Aerial video surveillance by IDF forces confirmed the departure of civilians from targeted areas prior to the attack as a direct result of the warnings.⁹⁰

One example referred to in the report is an incident in which specific warnings were given of the attack on the house of Nazar Ri'an on January 1, 2009.⁹¹ Since this is a good illustration of the manner in which warnings were used, it is worth describing in detail.

Ri'an and members of his family were killed in an aerial strike that hit their home. Ri'an was a senior Hamas operative, but he was not the target of the attack . . . Instead, the operational goal of the strike was to destroy Hamas' central compound in the Jabaliya refugee camp. The compound included several buildings that served as storage sites for large quantity of sophisticated weapons. . . . [T]he IDF issued several warnings before the attack. These included not only general leaflets and telephone calls, alerting civilians to avoid facilities serving Hamas and other terrorist groups, but specific phone calls to the residents of the targeted buildings, notifying them of the planned strike and warning them to evacuate the premises. The IDF also fired two separate rounds of preliminary warning shots with light weapons, 13 minutes and 9 minutes before the strike, providing sufficient time for residents to evacuate. The residents evidently understood these early warnings, as a group of them did leave the building, a fact confirmed by IDF surveillance before proceeding with the strike. The IDF observed this group evacuation and drew the reasonable conclusion that the buildings (including Ri'an's house) were empty. Only then did the IDF launch the strike.

Following the strike, secondary explosions were visible. This confirmed that Hamas used the buildings for weapons storage, and therefore it was a legitimate military objective according to the Law of Armed Conflict. Only later was it discovered that Ri'an

and his family chose to remain in the building after others had evacuated, leading to their death.⁹²

The measures taken by Israel to warn the civilian population during the operation have been described by some as “probably the most extensive, and most specific, warnings of offensive operations over such a short period in the history of warfare.”⁹³ However, the warnings given by Israel were criticized and found insufficient in the report prepared by the Fact Finding Mission headed by Richard Goldstone on behalf of the UN Human Rights Council (Goldstone Report).⁹⁴

The Goldstone Report has been strongly criticized, mainly with regard to its methodology, the reliability of the factual findings and the ensuing questionable conclusions.⁹⁵ These deficiencies are also evident with regard to its analysis of the warnings given during the operation.⁹⁶ In addition, doubts have been raised concerning different aspects of the legal analysis in the report, including in relation to the standards it has set regarding the scope of the duty to issue warnings prior to attack.⁹⁷ These standards will be examined in the course of the legal analysis of the different components of the obligation to warn in section III.

III. Analysis of the Obligation to Issue Warnings

After setting the legal framework and reviewing State practice with regard to warnings given to civilians prior to attack, we will now turn to an analysis of the scope and content of this obligation.

We will start with some general observations on the essence of the obligation to issue warnings prior to attacks and its relationship with the other rules and principles of the law of armed conflict. This will be followed by an analysis of the aim of the obligation to give advance warning. In this context we will discuss also the difference between a lawful warning and an unlawful threat. We will then examine the different aspects of warnings that influence their effectiveness: the temporal aspect, the recipient of the warning, the content of the warning and the method by which the warning is issued. Next we will explore the exception to this obligation, namely, when are circumstances such that an attacker need not issue a warning. Finally, we will conclude this section with a short reference to the ramifications of the warnings on civilians left behind.

A. The Essence of the Obligation

The obligation to give warnings prior to attack is one of the precautionary measures military forces are required to take under the law of armed conflict. The aim

of precautionary measures is to avoid (or at least to minimize) the collateral effects of hostilities on civilian persons, the civilian population and civilian objects.⁹⁸

Article 57(1) of API, which lays down the general rationale of precautions in attack, states that “constant care shall be taken to spare the civilian population, civilians and civilian objects.” In the *Commentary* to API it is explained that this article “appropriately supplements the basic rule of Article 48 . . . , which urges Parties to the conflict to always distinguish between the civilian population and combatants, as well as between civilian objects and military objectives.” The *Commentary* goes on to explain that “[e]ven though this is only an enunciation of a general principle which is already recognized in customary law, it is good that it is included at the beginning of this article in black and white, as the other paragraphs are devoted to the practical application of this principle.”⁹⁹ In other words, precautions in attack are meant to be practical means of enabling the application of the principles of distinction and proportionality. The precautions are meant to ensure, as much as possible, that civilians and civilian objects are spared. This is achieved by setting duties on commanders to do everything feasible to verify that the objectives to be attacked are military objectives and to choose means and methods of attack with a view to minimizing incidental injury to civilians and civilian objects by refraining from launching attacks expected to be in breach of the principle of proportionality¹⁰⁰ and by issuing warnings prior to attacks.

Beyond the legal aspects, there is also a practical connection between the issuance of warnings and the implementation of the principle of proportionality. Warning civilians prior to an attack enables them to evacuate the area before the attack takes place or to seek shelter at the time of the attack. This contributes to minimizing civilian casualties and to enhancing their protection. At the same time, the fact that civilians have evacuated an area or found shelter leads to a lower number of anticipated civilian casualties from the attack—namely, to less anticipated collateral damage—and hence increases the ability to carry out a proportionate attack.

This connection between giving a warning and fulfilling the proportionality standard leads to warnings being, on one hand, a valuable measure in reducing harm to civilians and, on the other hand, a useful tool in the hands of commanders for gaining more freedom of action. This does not mean that warnings are counter-productive in terms of enhancing the protection of civilians in armed conflict situations; on the contrary, this only reflects one of the realities of such situations, namely, that they are not necessarily zero-sum games.

B. Aim of the Warning

As discussed above, as one of the precautionary measures prescribed by the law of armed conflict, providing a warning prior to attack is aimed to enhance the

protection of civilians from the harmful consequences of hostilities. The way in which warnings contribute to this protection of the civilians is by providing them an opportunity to protect themselves from impending attacks. Based on this aim of the warnings, two main questions require analysis: (1) prior to which kinds of attack is a warning required and (2) what is a genuine warning and when is a warning actually a measure used to threaten or mislead the civilian population? We will now examine each of these questions.

B.1. Prior to What Kinds of Attack Is a Warning Required

B.1.1. Attacks Endangering Civilians. Again, the purpose of imposing a duty to give warnings prior to attack is to enable civilians to protect themselves from the consequences of the attack. Accordingly, all the legal instruments dealing with the obligation to issue warnings focus on attacks which might affect *civilians*. This is the case also in the military manuals. Therefore, there is no legal obligation to issue warnings in an area where there are no civilians or when there are no civilians likely to be affected by the attack.¹⁰¹

There are, of course, many examples of cases where members of armed forces have been warned of an impending attack.¹⁰² This does not mean that the warning was given as the result of a legal obligation, since other non-legal considerations also exist, such as getting the other side to surrender, thus avoiding unnecessary casualties to both parties to the conflict or when the aim of the operation is to capture prisoners, in order, for example, to promote a prisoner exchange. Calls to surrender may also be part of a psychological warfare campaign.¹⁰³

B.1.2. What Degree of Impact on Civilians Requires a Warning. Since the duty to give warnings prior to attacks refers only to attacks having an impact on civilians, the question arises as to what degree of impact raises this duty. Does the obligation to warn civilians apply only prior to attacks that might endanger the lives or physical safety of civilians or also when the expected results of the attack may affect them in other ways?

The standard set in this regard in Article 57(2)(c) of API is that the duty to warn applies to attacks “which *may affect the civilian population*.” (Emphasis added.) The term “may affect” is a very broad term that arguably could also encompass damage to property or even non-physical harm. However, according to the *Commentary* to Protocol I, the function of warnings is “to give civilians the chance to protect themselves.”¹⁰⁴ Similarly, the object of warnings specified in the *UK Manual* is “to enable civilians to take shelter or leave the area and to enable the civil defense authorities to take appropriate measures.”¹⁰⁵ Likewise, France’s LOAC Summary Note states that

warning must be given to the civilian population in order “to give it time to seek shelter.”¹⁰⁶

The emphasis on limiting the scope of the obligation to physical harm is explicitly stated in rule 37 of the *AMW Manual*, which stipulates that the obligation to issue a warning is limited to attacks that “*may result in death or injury to civilians.*” (Emphasis added.) In the *AMW Commentary* it is explained:

Rule 37 does not come into play when a particular air or missile combat operation may result only in damage to, or destruction of, civilian objects. Neither does it come into play in case the attack results in mere inconveniences to civilians caused by, e.g., electrical blackouts or reduced mobility due to broken lines of communications.¹⁰⁷

The formulation of rule 37 seems an accurate reflection of the State practice described above, which does not include examples of warnings given prior to attacks that were aimed at targets located near empty civilian objects or that caused only inconvenience to the civilian population.¹⁰⁸

Evaluating whether an attack may affect civilians also raises factual questions. In some cases there might be uncertainty as to whether civilians would be affected by the attack. The evaluation of whether an attack should be considered as one that “may” affect civilians is based on the information available to the person making the decision at the time of the attack.¹⁰⁹ In a case of reasonable doubt, however, warnings should be given (unless circumstances do not permit).¹¹⁰

B.2. Genuine Warnings versus Threats and Deception

Genuine warnings are an important measure to minimize the harmful effect of an attack on civilians by enabling them to protect themselves from the expected attack. There are cases, however, in which the warnings are not made with a genuine objective of protecting civilians, but rather are intended to terrorize civilians or to mislead them. This is an unlawful use of warnings. We will first address unlawful threats and then discuss when warnings become unlawful ruses of war.

B.2.1. Unlawful Threats. There is sometimes a thin line between lawful warnings and unlawful threats that are intended to terrorize the civilian population. Article 51(2) of API prohibits “acts or threats of violence the primary purpose of which is to spread terror among the civilian population”;¹¹¹ therefore warnings must not be used as a means of spreading such terror.¹¹² The defining element in differentiating between lawful warnings and unlawful threats is the intention. Article 51(2)’s prohibition on terrorizing civilians refers to threats “the *primary purpose* of which is to spread terror.”¹¹³ (Emphasis added.) In the *Galić* case, the International Criminal Tribunal for the former Yugoslavia emphasized that the prohibition on terrorizing

a civilian population applies only when there is a “specific intent to spread terror among the civilian population” and that this “was principal among the aims” of the act.¹¹⁴ Therefore, it does not include genuine warnings, even when worded in a frightening way, since their “primary purpose” is to get civilians out of the area for their protection and the principal aim of the action is not to cause terror.¹¹⁵

According to the *CIHL*, threats that all civilians would be considered liable to attack have been condemned and withdrawn.¹¹⁶ By contrast, warning civilians that anyone staying in a combat zone is endangering his or her life should not be considered a threat, but rather a mere reflection of the real danger facing those who remain behind. Warnings must be effective and, therefore, should be worded in a way that clarifies the danger in a forceful manner.¹¹⁷

A related issue regards situations of unlawful internal displacement of civilians. According to the UN Reports on Lebanon, unlawful arbitrary displacement includes “displacement in situations of armed conflict which is not warranted by the need to ensure the security of the civilians involved or imperative military reasons.”¹¹⁸ The UN Reports insinuate that the Israeli warnings in Lebanon were used as a means to achieve such internal displacement.

The conclusion of the two Reports that warning civilians during battle might be regarded as internal displacement of civilians that constitutes a violation of the law of war is legally unsound since the rules forbidding deportation or forcible transfers in times of armed conflict refer mainly to occupied territories and require a degree of control over the population that does not exist merely by issuing warnings.¹¹⁹ Moreover, as for the Israeli warnings in Lebanon, while they did lead to a massive evacuation of areas in south Lebanon and parts of Beirut, they were, according to Israel, intended to spare civilian lives. Since these warnings were followed by aerial and ground operations in those areas that did indeed pose a risk to the civilians residing there, the evacuation did protect civilians’ lives.¹²⁰ It is therefore not clear on what basis the UN Reports conclude that the Israeli intentions were not genuine.¹²¹

B.2.2. Unacceptable Ruses of War. The *API Commentary* states that since the aim of the warnings is to give civilians the chance to protect themselves from the consequences of the attack, ruses of war regarding warnings that would deceive the population and nullify the proper function of warnings are unacceptable.¹²² This concerns messages conveyed to civilians cloaked as warnings about an impending attack when there is no real intention to carry out such an attack. The rationale for this limitation is that once false warnings are given, civilians will not trust genuine warnings and, as a consequence, will ignore them. This would lead to defeating the purpose of the warnings, that of giving civilians the possibility of protecting themselves from the consequences of the attack.

Henderson contends that from the wording of the *API Commentary*, which uses the term “unacceptable” and not “illegal” or “unlawful,” “a distinction can be drawn between a ruse that causes an unnecessary evacuation, and thereby limits the effectiveness of future warnings, which is unacceptable but not unlawful, and a ruse that actually contributes to collateral damage, which is unlawful.”¹²³ Clearly, using warnings in order to purposefully endanger civilians is unlawful; however, any use which is counterproductive to the aim of the warnings, that is, to enable civilians to protect themselves, should be avoided.

The limitation on ruses of war with regard to warnings does not mean, of course, that every warning must be followed by an attack, since there are cases where decisions change for different reasons, including operational, policy and humanitarian considerations.¹²⁴ The focus is on the intention at the time the warning was issued.

C. What Is Considered to Be an “Effective” Warning

In order to achieve the aim of the warnings, warnings must be effective. We will now turn to an analysis of this requirement.

At the outset it must be emphasized that the effectiveness of a warning must be viewed in light of its evaluated effect at the time of its issuance based on the assessment of the available information at the time, and not in light of the results of the warning. Therefore, even if a warning was unsuccessful in causing civilians to protect themselves, this does not necessarily mean that the warning should be determined to not have fulfilled the requirement to be effective.¹²⁵ Furthermore, there is no precise formula of what is considered an “effective warning.” As Rogers puts it, what is “effective” must be a matter of common sense.¹²⁶ Similarly, the Australian manual states that the requirement to give effective warnings must be “applied in a commonsense manner in light of all other factors.”¹²⁷

It is also important to acknowledge the inherent uncertainty of armed conflict situations, in which circumstances are unpredictable and constantly changing.¹²⁸ This reality has implications on what is considered an effective warning. Thus, for example, in some cases there may be uncertainty with regard to the manner in which military operations and attacks are going to proceed. Accordingly, it is not always clear where the fighting will take place, what targets will be attacked and which areas will be safer than others. Much depends, of course, on the actions of the enemy forces.

This might pose a dilemma as to whether it is preferable to issue warnings sooner, despite the vagueness of the situation, or to wait until the situation is clearer. In some cases, giving warnings could actually reduce the protection of civilians. As an example, civilians are requested to evacuate an area and proceed

toward a certain location; however, the fighting does not reach the places from which they have evacuated or, even worse, reaches the destination to which they have been directed. On the other hand, postponing the warning might lead to it being given at a time when it has become impossible for civilians to evacuate in an orderly manner. Similar dilemmas might exist with regard to the level of specificity of the warnings; hence the choice is many times in favor of the lesser of two evils.

In analyzing the effectiveness of a warning, different factors must be considered. These are (1) the temporal aspect—when should the warning be given, (2) the recipient of the warning—to whom is it addressed, (3) the content of the warning and (4) the method by which the warning is issued. We will analyze each of these factors separately; however, there is an interrelationship among them. Therefore, the assessment as to whether a warning is indeed effective must be made on the basis of the accumulation of all these factors, taking into account the factual circumstances.

C.1. The Temporal Aspect—When Should the Warning Be Given

As the *UK Manual* succinctly states it, in order to be effective a warning must “be in time.”¹²⁹ The decision as to when is the right time to issue a warning depends on the circumstances and is related to the content of the warning. This is also pointed out in the *AMW Commentary*.¹³⁰ In analyzing the issue of the correct time to give a warning, a distinction may be made between two different types of warnings—warnings given prior to an attack on a specific target and general warnings to the residents of a certain area. We will examine each of these types.

C.1.1. Warnings Given Prior to an Attack on a Specific Target. In order to be effective, warnings that a specific target is about to be attacked must be issued within a reasonable time before the attack is actually launched. If a warning is issued too close to the time of the attack, it might not allow sufficient time for the civilian population to evacuate.¹³¹ Conversely, there may be well-founded military considerations that favor not giving a warning well in advance, if, for example, to do so would give the enemy the opportunity to remove weapons or other movable military equipment held inside the designated target.¹³² But a warning must not be issued too early either, as this might lead people to believe that the threat is no longer valid. For example, in the case of the attack on the Belgrade television and radio station, eleven days passed between the warning received by Yugoslav authorities and the execution of the attack. By the time of the attack, civilian employees, who had emptied the building at an earlier point in time, had returned to the building believing the threat had passed.¹³³

C.1.2. General Warnings. When warnings call upon civilians to evacuate a certain area, in order to be considered effective the population must be given enough time and opportunity to evacuate safely (unless circumstances do not permit).¹³⁴ Obviously, the amount of time needed for residents of a region or village to leave the area is much greater than the time required for residents of a certain street to leave, and significantly more than what residents of a particular building need in order to vacate it. In other words, the time that must be given for evacuation is dependent on the scope of the area from which the evacuation is sought, the number of those required to evacuate, the destination to which they are to evacuate, the state of the roads leading thereto and so forth. All these considerations must be taken into account.

On the other hand, the commander also has to weigh military concerns, such as the manner in which enemy forces might utilize the period given for evacuation in order to reinforce targets within the designated area, to initiate attacks from within it or to operate in proximity to civilian convoys, using such civilians as human shields against forceful responses.

As an alternative to evacuation, when circumstances do not permit civilians enough time to evacuate safely, it might be preferable to just warn them to stay indoors and take shelter.

C.2. The Recipient of the Warning—to Whom It Is Addressed

In order for a warning to be considered effective, it must be addressed to the appropriate recipients, namely, those who can utilize the warning in order to protect civilians from the approaching attack. In this context two aspects will be analyzed: when can or should the warning be addressed to the authorities of the other side and who should receive the warning.

C.2.1. Warning the Authorities. In the historical instruments dealing with warnings, beginning with the 1874 Brussels Declaration and including the 1907 Hague Regulations, the duty is to provide a warning to the authorities of the other side.¹³⁵ By contrast, Article 57(2)(c) of API does not indicate to whom the warning is given, simply stating that “effective advance notice shall be given.” Most military manuals do not limit giving of notice only to authorities of the other side, and either refrain from mentioning the recipient of the warnings or explicitly refer to warning the civilian population directly.¹³⁶ This is also the requirement in the *AMW Manual*.¹³⁷ Direct warnings to the civilian population seems to also reflect the current actual practice of States.

One explanation of this shift is that in the past there was usually no direct connection between the armed forces of one party to the conflict and the civilians of

the other party; thus the means of spreading the warning directly to civilians were limited—such is often not the case today. The change might also represent another reflection of the shift in the law of armed conflict from its focus on inter-State relations to protection of civilians.¹³⁸

Notwithstanding this shift in the law, even today warnings to the authorities would sometimes suffice if they are effective.¹³⁹ This is demonstrated by the conclusion of the prosecutor reviewing NATO's bombing campaign in the former Yugoslavia, who seems to accept that notifying the Yugoslav authorities of the impending attack on the Belgrade television and radio station may have been sufficient to fulfill the warning requirement.¹⁴⁰ The determination as to whether warning the authorities would suffice relies on their ability to reach the relevant civilian population in an effective manner.¹⁴¹ Accordingly, as Rogers explains, a warning to the authorities hundreds of miles away and cut off from the proposed attack would not be considered effective.¹⁴²

C.2.2. Who Should Receive the Warning. When a warning is given directly to the civilian population, the question arises to what part of the population it must be addressed. According to the *AMW Commentary*, there was disagreement among the Group of Experts that drafted it over the question of whether the duty to issue warnings is limited to warning civilians located in close proximity to the target.¹⁴³ In some of the military manuals there is reference to such a limitation,¹⁴⁴ though in others there is not.

In our view, limiting the duty to give warning to only warning those in “close proximity” to the target is too restrictive. Rather, the determination of who ought to be warned should rest on the anticipated harm under the circumstances of the attack. In this regard, we think the *AMW Commentary* provides a good standard, namely, that the warning must reach the civilians likely to suffer death or injury from the attack.¹⁴⁵ Thus, if accurate smaller munitions are used, civilians in the next street need not be warned, while if widespread heavy bombing is anticipated, civilians located in a larger area who might be killed or injured as a result of the attack should receive warning. This does not mean that any civilian who might be somehow affected by an attack must be warned, as discussed above when the aim of the warnings was addressed.

As with the determination about the right time to give the warning, the decision on who should be the recipient of the warning depends on the circumstances and is related to the content of the warning. Thus in the Gaza operation a general warning was issued in the first phase to almost all the civilians in the Gaza Strip, calling on them to stay away from sites where Hamas was conducting combat activities. Later, regional warnings were given to civilians living in certain areas, calling on them to

leave these areas, and specific warnings were given prior to attacks on individual buildings to the residents of those buildings, warning them to leave the location before the attack.¹⁴⁶ Another example of the connection between the content and the recipient of the warnings is the warning given by coalition forces in southern Iraq during Operation Iraqi Freedom to repair workers that communications links being repaired would be attacked.¹⁴⁷

This exemplifies how the proper recipients of the warning are determined based on the circumstances of the attack against which they are being warned. When it is a specific planned attack on a defined location, the warning is addressed to those who might be directly affected by the attack. When it is an attack on certain objects or infrastructure, it is directed toward those in close proximity to such objects, and when it is a wide-scale operation, such as an anticipated ground operation or massive air raid, it is given to residents of large areas, even though some of them might not eventually be affected by the ensuing attack.¹⁴⁸

C.3. The Content of the Warning

In discussing the content of the warning several aspects deserve analysis. These are the clarity of the warning, the specificity of the warning, the need to repeat warnings and the inclusion of instructions to civilians.

C.3.1. The Clarity of the Warning. In order to be considered “effective,” a warning must be sufficiently specific and comprehensive so as to enable civilians to protect themselves from the impending attack.¹⁴⁹ An obvious example is that a warning in a language the population does not understand will not be considered effective.¹⁵⁰

It must be acknowledged, however, that there may be objective difficulties in issuing very clear and definite warnings and that sometimes warnings will inevitably be vague as a result of the inherent uncertainty of situations that occur during armed conflict. Understanding the uncertainty of the situation is also important when assessing after the fact the clarity of the warnings. Some of the criticism of Israeli practices and those of other States seems to overlook this reality. Assessing the clarity of a warning must be done without the benefit of hindsight and in light of the information available to the commanders at the time of the decision to give the warning. For example, with regard to the operation in Gaza, Israel has been criticized for what some described as unclear and confusing warnings.¹⁵¹ The Goldstone Report stresses that “[t]he effectiveness of the warnings has to be assessed in the light of the overall circumstances that prevailed and the subjective view of conditions that the civilians concerned would take in deciding upon their response to the warning.”¹⁵² In other words, the report implies that since civilians

face an uncertain situation, the warnings ought to be more accurate and clear.¹⁵³ Shany sees this as yet another example of the report's "human rights-dominated approach to an armed conflict situation," which focuses on the rights of the individual civilian—and on his or her viewpoint—without giving due weight to the military concerns of those involved in the conflict.¹⁵⁴

Ultimately, although the underlying aim of warnings is to enable civilians to protect themselves, the determination of the extent of clarity and accuracy they must fulfill in order to be considered effective cannot disregard the realities of the situation and the concerns and constraints of the military forces involved.

C.3.2. The Specificity of the Warning. Rule 37 of the *AMW Manual* states that warnings ought to be "as specific as circumstances permit."¹⁵⁵ According to the *AMW Commentary*, this means that they should not be vague, but "be as specific as circumstances permit to enable the civilian population to take relevant protective measures."¹⁵⁶ The *UK Manual* requires warnings to be "sufficiently specific" in order to enable civilians to take shelter or leave the area.¹⁵⁷ It is not easy, however, to determine how specific and direct warnings ought to be.¹⁵⁸ One question in this regard is whether a general warning is enough or is there a legal obligation to provide specific warnings to the particular civilians who may be harmed by the attack.

General warnings may consist, for example, of a blanket alert delivered by leaflets or by broadcasts advising the civilian population to stay away from certain military objectives.¹⁵⁹ Sometimes a warning can contain a list of the objectives that will be attacked.¹⁶⁰ General warnings would usually not include any specific information regarding the attack.

Specific warnings aimed at civilians present in a more concrete target (such as a certain building) would usually involve providing more details regarding the geographical boundaries of the area to be affected and a description of the time of the expected attack in order to enable the civilians to leave or seek shelter. In addition, they might also include precise details of the impending attack.

According to the US manuals warnings might be general and do not have to include specific details regarding the attack. The *Operational Law Handbook* states, "Warnings need not be specific as to time and location of the attack, but can be general and issued through broadcasts, leaflets, etc."¹⁶¹ In the *CIHL*, US officials are quoted as stating that a "blanket warning" may suffice.¹⁶²

In his article on precautions in attack, Quéguiner acknowledges that the question of whether an abstract warning is enough, or whether a particular warning must be given before a specific attack that may affect the civilian population, does not have a clear-cut answer. He goes on to submit, however, that "the level of

precision required will depend on the general objective pursued; the attacking party will have to ensure the immunity of the civilian population and civilian property, while also taking into account its own military interests in each strategic context.”¹⁶³ It seems, however, that this standard exceeds what is required by the current rules of the laws of armed conflict. There is no obligation to “*ensure the immunity of the civilian population*” nor is there usually any practical way of fulfilling such a high standard.

On the other hand, warnings must be effective, namely, they must give relevant information to civilians who might be affected by the attack, thus enabling them to protect themselves as much as possible from the impending attack.¹⁶⁴ Therefore, specific warnings might be required if not providing them would mean that civilians have not received the information necessary to take protective actions. This seems to be the meaning of the standard set by the *AMW Manual* and by the *UK Manual*, as discussed above.

In this regard, the degree to which a warning must be specific and detailed is dependent on the context and circumstances of the situation. Relevant factors include the timing of the warning in relation to the attack, the available modes of issuing the warning,¹⁶⁵ the objective of the warning, the amount of control the forces have in the area, the severity of the situation, the urgency of the attack and so forth. In addition, in determining what details to include in a warning, consideration must also be given to the risk posed to mission accomplishment and to the security of the forces.¹⁶⁶

As previously discussed, during the Gaza operation, general warnings were issued in the first phase of the operation calling on civilians to stay away from sites used by the Hamas forces. Next, regional warnings were provided in certain areas, calling on civilians to evacuate those places prior to IDF operations therein, and then specific warnings were given a short time prior to attacks on individual buildings, giving their residents time to leave the buildings.¹⁶⁷ Interestingly, in spite of these comprehensive warning procedures, the Goldstone Report finds these warnings to be insufficient.¹⁶⁸ Schmitt criticizes this conclusion and stresses that these warnings were extensive and specific in an unprecedented manner.¹⁶⁹

A question arises whether the extensive nature and specificity of the warnings issued by Israel in Lebanon and particularly in the Gaza operation reflect a legal obligation with regard to the scope of the obligation. As addressed in section III.A, issuing warnings might have an effect on the proportionality of an attack and, as a consequence, on the freedom of operation of forces. Therefore there might be an incentive to give specific warnings even when to do so is not derived from a legal obligation. Moreover, for moral or policy considerations¹⁷⁰ even a proportionate outcome of an attack might not be sufficient, leading to stricter limitations on the

use of force¹⁷¹ and also, possibly, to the issuance of more extensive warnings. These kinds of extralegal considerations played an important role in the Israeli conduct during its military operations.¹⁷² They led to a decision to give extensive warnings beyond what may be considered as legally required under the laws of armed conflict in order to minimize civilian casualties. One must also bear in mind that Israel had close contact with, and relatively good intelligence regarding, the Gaza Strip, which enabled it to give such specific warnings as telephone calls to the inhabitants of houses planned to be attacked.¹⁷³ It was these unique circumstances that enabled Israel to carry out such extensive methods of warnings.

It would seem wrong, therefore, to deduce from the Israeli practice in Gaza that the various methods of providing warnings and their specificity represent an implementation of a legal obligation. This conclusion is reinforced when the elements necessary for the formation of a rule of customary law are considered. Since there is no known previous practice of such extensive warnings, there was clearly no existing customary rule requiring them. Israel's practice alone cannot create a new legal norm, since widespread practice is necessary. Moreover, as has been indicated, Israel was also driven by moral and policy considerations; therefore the element of *opinio juris* is also missing.¹⁷⁴

C.3.3. Repetition of Warnings. Another question that arises is whether, after a warning has been given, there might still be a duty to issue further warnings in order to minimize civilian casualties.

An illustrative example appears in the European Union report on the conflict in Georgia with regard to the Georgian attack on Tskhinvali. Georgia is criticized because, following a general warning and a three-hour unilateral ceasefire to allow the remaining civilians of Tskhinvali to leave the conflict area, there was no additional general advance warning given to the remaining population when the offensive on Tskhinvali was carried out that night.¹⁷⁵ The authors of the report do not specify what the content of a second warning should have been, but it may be assumed they meant this would be a warning aimed at enabling those left behind to seek shelter at the time of the attack.

In his article on precautions, Quéguiner also refers to this question. He acknowledges that States usually fulfill the duty to warn "by issuing a general warning to the civilian population" and that "the attacking commander does not have to issue multiple warnings of the danger incurred by a civilian population that is located near a clearly defined military objective that has been declared as such."¹⁷⁶ He contends, however, this "does not exempt the attacking commander from giving further, more precise warning whenever possible or necessary."¹⁷⁷ Quéguiner gives an example of a target which is "an infrastructure that is essential for public service

and is staffed almost permanently by civilians.”¹⁷⁸ In such a case, he concludes that the warning will, depending on the circumstances, have to be more specific. He explains:

It is obviously impossible for a party to the conflict to accept an interruption in public services just because an enemy has designated these services as a legitimate military objective. In order to spare the civilian population working at the site, a more precise warning must be issued as early as possible.¹⁷⁹

In order to determine whether a warning should be repeated we must return to the aim of the requirement to provide warnings, that is, to give civilians an opportunity to protect themselves from the ensuing attack. Therefore, if a general warning is sufficient to achieve this aim, there would be no legal requirement to issue further warnings. However, in cases where the general warning has left the civilian population without a reasonable understanding of how to protect itself, or when the content of the warning has changed, an additional warning might be required, subject to military considerations.

The case of the attack on Tskhinvali seems to represent an example of such a case. In that case a general warning to evacuate was given, but since that warning did not indicate when the attack was to take place, an additional warning addressed to those civilians left behind might have been required, if circumstances permitted, in the period immediately prior to the attack. The rationale of each warning is different: the first is general and aimed at getting civilians to evacuate the area; the second is more specific and is given closer in time to the attack in order to allow those remaining behind to take shelter against the approaching attack.

In Quéguiner’s example, the first warning is a general warning to stay away from certain locations. An additional, more specific warning would not necessarily be required with regard to such locations unless the target has a special nature that attracts civilians, such as a public service facility or a place that civilians regard as a possible shelter (schools, etc.); then an additional warning might be necessary. Moreover, it is worth noting that in both examples there is still a need to fulfill the distinction and proportionality requirements. Even if an additional warning would not be considered as being required by the law, its absence might lead the attack to be deemed disproportionate.

C.3.4. Instructing Civilians. A further question with regard to the content of the warnings is whether they must include specific instructions explaining to affected civilians what they should do in order to protect themselves from attack.

When civilians are warned to evacuate a certain area they might be advised of the direction they should take or the routes they should follow. The question still remains whether there is a legal obligation to provide such and other guidance. According to one of the UN Reports on Lebanon, military forces issuing a warning “should take into account how they expect the civilian population to carry out the instruction and not just drop paper messages from an aircraft.” The report asserts that warnings must be very elaborate and give civilians “clear time slots for the evacuation linked to guaranteed safe humanitarian exit corridors that they should use.”¹⁸⁰ The Goldstone Report finds that in order for a warning to civilians to be considered effective, “it must clearly explain what they should do to avoid harm and . . . [a]s far as possible . . . state the location to be affected and where the civilians should seek safety.”¹⁸¹

Determining that a warning must be that specific does not seem to reflect existing legal requirements¹⁸² nor represent current State practice. Moreover, none of the military manuals includes such a duty and the US manuals actually emphasize that warnings may be general.¹⁸³ Furthermore, according to the law of armed conflict the party subject to attack bears the responsibility for taking precautions against the effects of the attack.¹⁸⁴ This is reflected in Article 58 of Additional Protocol I, which provides, “The Parties to the conflict shall, to the maximum extent feasible . . . take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.”¹⁸⁵

The purpose of Article 58 is to place on the defending party the main responsibility of taking the defensive measures necessary to protect its civilians against attacks. The law of armed conflict does not impose an obligation on the attacking side to deal with this aspect of the safety of civilians of the opposing party.¹⁸⁶ This also comports with practical considerations—the attacking party usually does not have adequate knowledge of the relevant services and infrastructure to issue detailed instructions to the civilians of the opposing party.

It is not surprising that the claim that warnings should include instructions to civilians of the other side is raised by human rights bodies. Such a requirement is a clear reflection of human rights standards which put the emphasis on the rights of civilians vis-à-vis the armed forces of the parties to the conflict and which have a different rationale than that of the law of armed conflict.¹⁸⁷ The proper relationship between human rights law and the law of armed conflict is one of the most contentious topics in the field of international law today and is not addressed in this article.¹⁸⁸

Having said that, we recognize that in order to fulfill the aim of enabling civilians to protect themselves from attack, there might be situations in which warnings need to include some guidance and instruction as to how civilians should act

following receipt of the warnings. Such circumstances may exist when, without such information, the warnings would not give the civilians sufficient understanding of what they need to do in order to protect themselves and the attacking side has the ability of clarifying the situation without compromising its military concerns.

C.4. The Method by Which the Warning Is Issued

Warnings can be given by radio and television broadcasts, by telephone calls and even by Internet announcements,¹⁸⁹ or by dropping or distributing leaflets (and, of course, by a combination of all these methods).¹⁹⁰ Sometimes they can be given by word of mouth, when ground forces are operating¹⁹¹ or where territory is occupied by the enemy.¹⁹² In some cases, warnings may be given by aircraft flying low over the objective.¹⁹³ The possibility of giving warnings from the air depends on which party has control of the airspace and what air defenses are in place.¹⁹⁴ The *AMW Commentary* states that “[w]arnings need not be formal in nature. They may be issued either verbally or in writing, or through any other means that can reasonably be expected to be effective under the circumstances.”¹⁹⁵

A question arises whether warnings can be made by using warning shots. As above examples illustrate, there have been instances when this method has been used.¹⁹⁶ In the *AMW Commentary* it is acknowledged that “[i]n some situations the only feasible method of warning may be to fire warning shots using tracer ammunition, thus inducing people to take cover before the attack.”¹⁹⁷ We agree with this assertion though we do not believe it is necessarily limited to tracer ammunition since inducing civilians to take shelter might also be achieved with regular ammunition and tracer ammunition might not always be available.

Warning shots are commonly used in law enforcement situations, such as in instances where they are necessary in order to get a suspect to surrender to arrest after verbal warnings have been disregarded.¹⁹⁸ Though this is a different kind of warning than that discussed in this article, it does share a similar rationale of giving a clear warning prior to the use of force in order to avoid, if possible, physical harm. Therefore, in our view, the widespread use of warning shots in law enforcement situations reinforces the lawfulness of using warning shots from the air or from equivalent platforms as a method of warning civilians prior to attack.

Israeli practice, as previously discussed, included the use of warning shots as part of the specific warnings given to the occupants of a particular target. This was done in cases where prior warnings, through phone calls and other means, were not heeded. These warning shots were fired using small munitions that hit the roofs of the designated targets.¹⁹⁹

In the Goldstone Report this method, termed “roof-knocking,” is criticized. The report argues that roof-knocking “constitutes a form of attack against the

civilians inhabiting the building” and that “an attack, however limited in itself, cannot be understood as an effective warning in the meaning of article 57(2)(c).”²⁰⁰ The correctness of this claim requires further analysis.

First, as has been illustrated, State practice and military legal manuals include warning shots as a legitimate method of issuing warnings. Moreover, even if warning shots are considered “an attack,” it is incorrect to view them as an attack “against civilians,” because they are not fired at civilians, since the objective of their use is to avoid harm to civilians. In this regard, as Schmitt notes, it is important to bear in mind that since the object of the warning shots is a military objective²⁰¹ (otherwise the whole attack fails the distinction principle), the “attack” performed by the warning shots is aimed at a lawful target and the presence of non-combatants therein is at most a matter of proportionality, not one of directly attacking civilians.²⁰²

D. The Exception—When Not Issuing a Warning Is Justified

As specified in Article 57(2)(c) of API, as well as in rule 37 of the *AMW Manual* and most military manuals, warnings are not required if “circumstances do not permit.”²⁰³ It should be noted, however, that some manuals use different formulations and provide that warnings should be given “if the military mission allows”²⁰⁴ or “when the tactical situation permits.”²⁰⁵ This exception reflects the understanding that sometimes the existing circumstances preclude giving a warning prior to attack. The analysis of the exception will be divided into two parts as follows: the situations covered by the exception and general considerations in applying the exception.

D.1. The Situations Covered by the Exception

The exception does not comprise a *numerus clausus* of situations, but depends on the particular prevailing circumstances at the time of the decision. However, the presence of circumstances that justify not issuing an advance warning would usually be determined based on one of the following rationales: mission accomplishment, force protection, speed of response or practical impossibility. We will now briefly examine each of these considerations.

D.1.1. Mission Accomplishment. The fact that warnings are not required with regard to surprise attacks was recognized in the earliest articulations of the rules addressing warnings.²⁰⁶ The 1907 Hague Regulations provide that no warning need be given in cases of “assault,” with “assault” being understood as referring to surprise attacks. The rationale of not imposing a duty to warn in such attacks is that these attacks require surprise in order to accomplish the mission. Dinstein comments

that “surprise is one of the main staples of warfare, not only when an assault is contemplated.”²⁰⁷ He finds that “[t]he practice of states shows that the desire to achieve surprise may frequently preclude warnings in non-assault situations.”²⁰⁸

Article 57(2)(c) of API has less restrictive wording, not limiting the exception to cases of “assault.” Hays Parks remarks that the article relaxed the warning requirement that appeared in the Hague Regulations, while simultaneously aligning it with the customary practice of nations in the twentieth century.²⁰⁹

The exception covers cases where the success of the military operation is contingent on the element of surprise,²¹⁰ such as in instances when the target is transportable and might move or be moved away if a warning is issued in advance.²¹¹ An illustrative example of an attack requiring surprise was the Israeli attack on the long-range rockets carried out in the first stages of the war in Lebanon in 2006.²¹² Warning in advance of these attacks would have enabled moving the rockets to different, unknown locations, thus preventing the achievement of the operational end.

The focus of this exception is on the effect giving an advance warning will have on the chances of success of the military operation. A question may arise whether the exception applies only when surprise is essential for the success of the operation or whether it also applies when surprise only contributes to fulfillment of the mission. The *API Commentary* refers to cases in which giving advance warning prior to an attack is inconvenient²¹³ since the element of surprise “*is a condition of its success.*”²¹⁴ The ICRC’s *CIHL* uses the term “*essential to the success of an operation.*”²¹⁵ The *AMW Commentary* talks of an operation “*predicated on the element of surprise.*”²¹⁶ The *UK Manual* refers to cases “where the element of surprise is *crucial to the success of the military operation.*”²¹⁷ The *US Operational Law Handbook* uses the phrase “where surprise is a *key element.*”²¹⁸ The Australian manual refers to an action that “is likely to be *seriously compromised* by a warning.” The opinion of a US legal advisor in 1995 quoted in the *CIHL* refers to use of the element of surprise in an attack on enemy military forces in order “to *increase its chance for successful accomplishment of the mission.*”²¹⁹ Quéguiner, when analyzing the exception, indicates that it includes cases where giving a warning prior to attack would result “in *annihilating—or at least seriously compromising—the military operation’s chances of success.*”²²⁰

It is difficult to deduce an exact legal standard that justifies not giving a warning for reasons of mission accomplishment. It seems safe to say that lack of surprise does not have to lead to a total unquestionable failure of the mission and that it would suffice if the prospect of success was “seriously compromised.” It would seem insufficient, however, for surprise just to be convenient for the attacking forces, and the formulation of “increase the chances of success” seems too broad.

As in other cases, there is no clear-cut formula and the evaluation as to whether there is sufficient justification for not providing a warning in order to retain the element of surprise would have to rely on reasonableness, taking into account the circumstances of the situation.

D.1.2. Force Protection Considerations. This exception, which provides warnings need not be issued when “circumstances do not permit,” allows the taking into account of the safety of attacking forces,²²¹ such as in circumstances when issuing a warning will enable enhancement of the target area’s defenses in a way that will increase the risk to the attacking forces.²²² An example of when warnings were not provided due to force protection considerations is the explanation given by NATO authorities, according to Amnesty International, with regard to NATO operations over Kosovo, in which warnings were not given, due to the risk to the aircrews.²²³ In this regard, warnings are more feasible when one side has air or tactical supremacy—hence giving advance warning creates less risk to the attacking aircrews.²²⁴

Admittedly, there is a close relationship between mission accomplishment and force protection and sometimes a warning would compromise both, such as when it could enable the opposing side to shoot down the attacking aircraft prior to the attack, however, these are separate considerations. Thus, for example, in a case when a warning might lead to removal of military equipment from the target, the warning would compromise mission accomplishment but does not necessarily affect force protection. On the other hand, if it is a fixed target warning in advance might lead to a threat to attacking forces on the way back from the attack, but might not affect the success of the mission.

Here again it may be asked what level of threat to the forces justifies not giving advance warnings. According to the *UK Manual* it is permitted not to issue a warning “where the safety of attacking forces *would be compromised*.”²²⁵ The US naval handbook refers to preventing forces from being “*placed in jeopardy*.”²²⁶ The opinion of the US legal advisor in 1995 quoted in the *CIHL* refers to use of the element of surprise in order to “*reduce risk to the attacking force*.”²²⁷ Without entering into the intricate discussion of the appropriate weight force protection considerations should have in the proportionality analysis in general,²²⁸ for the purpose of warnings it seems that this is undoubtedly a central consideration. As with mission accomplishment, it would seem correct to conclude that not every remote risk to forces would justify not giving a warning. However, the level of risk to the safety of forces that would justify not giving a warning might arguably be less than the level of risk to mission accomplishment required in order to refrain from giving a warning. This can be exemplified in the wording of the *UK Manual* dealing with the applicability of the exception, which uses the term “crucial” with regard to the effect a

warning might have on the success of the mission, and the much more lenient standard of “be compromised” with regard to safety of the forces.²²⁹

D.1.3. Speed of Response. Another instance where circumstances would permit not giving warnings is when the situation does not allow time to give warnings, due to the necessary speed of response.²³⁰ One such situation is when troops are attacked and are required to respond to the attack.²³¹ In such circumstances, they obviously do not have time to issue an advance warning.

Another kind of case is that involving time-sensitive targets (TSTs)—a TST is “[a] target requiring immediate response because it is a highly lucrative, fleeting target of opportunity or it poses (or will soon pose) a danger to friendly forces.”²³² An obvious example of such a target is a rocket about to be launched.²³³ Such cases should be differentiated from the earlier-discussed surprise and force protection considerations. Those categories deal with preplanned attacks in which the justification not to give a warning can be contemplated in advance at the planning stages. In cases of TSTs or counterfire situations, the fact that an advance warning is not given is inherent in the situation since there is no time to give such a warning prior to the attack.²³⁴

D.1.4. Practical Impossibility of Giving a Warning. Another category of cases falling within the exception is when there is no reasonable possibility of issuing an effective warning, such as when there is no way to convey the warning due to a lack of means of communication. This seems to be a straightforward justification for not issuing a warning; it simply cannot be done.

D.2. General Considerations in Applying the Exception

A few general considerations deserve mention with regard to the implementation of the exception to the obligation to provide warnings.

First, in some cases circumstances prevent giving specific warnings but it might still be possible to give a more general warning.²³⁵ This brings us back to the discussion on the extent warnings must be specific and acknowledges that this depends, among other factors, on military considerations. For example, if there is an intention to attack places being used to house weapons, specific warnings might lead to the removal of the weapons and hence to compromising the success of the mission. However, general warnings may still be possible, informing in general terms to stay away from places used to store military equipment.

Second, it must be stressed once again that the determination as to whether the exception applies is made by the commander in light of the relevant circumstances and based on the information available to him or her at the time of the decision.²³⁶

Third, the decision not to issue a warning, even when falling within the exception, might have an impact on the possibility of carrying out the attack. As has been discussed, the fact that a warning has not been given prior to an attack, even if justifiably, may affect the proportionality analysis due to the fact that civilians who may have left had a warning been issued remain in the area, thus leading to increased collateral damage. In these circumstances, while not issuing a warning is justified, the absence of a warning would lead to the attack failing the proportionality test, therefore being deemed unlawful.

As an example, beneath a civilian residence there is a large weapons depot that is a legitimate target, but giving a warning prior to attack could lead to the weapons being removed; therefore it would be justified not to give such warning. If, however, the number of civilian casualties anticipated from such a surprise attack is viewed as excessive in relation to the military advantage expected from destroying the weapons, the attack would be considered disproportionate. In such a case, commanders may decide to issue a warning, taking into account that some weapons would be removed, but assessing that the advantage of destroying the weapons left behind (albeit smaller than the advantage gained from destroying all the weapons) would then be proportionate because of the much lower number of civilian casualties since civilians would have had the opportunity to leave the building prior to attack.

In this context, the suggestion made in the Goldstone Report that when evaluating whether circumstances permit not issuing a warning, a balancing process is required in order to determine “whether the injury or damage done to civilians or civilian objects by not giving a warning is excessive in relation to the advantage to be gained by the element of surprise for the particular operation”²³⁷ deserves comment. In other words, the report suggests a proportionality analysis that weighs the potential incremental military advantage gained from not providing a warning against the potential increased damage to civilians or civilian objects that may occur in the absence of a warning. Schmitt explains that this does not represent the existing legal requirements of the law of armed conflict, and that the report is confusing the warning requirement with the principle of proportionality.²³⁸ Schmitt clarifies “that an attacker is already required to assess the proportionality of a mission as planned; the issuance of warnings would be a factor in that analysis, as would other factors such as timing of the attack, weapons used, tactics, life patterns of the civilian population, reliability of intelligence, and weather. A subsequent proportionality analysis would consequently be superfluous.”²³⁹

E. The Ramifications—How to Regard Those Not Heeding the Warning

It is incontrovertible that following warnings civilians remaining in the zone of operation retain their civilian status.²⁴⁰ The *AMW Commentary* emphasizes that

“[a]n effective warning does not make an unlawful attack lawful, nor does it divest the attacker from its other obligations to take feasible precautionary measures.”²⁴¹ Accordingly, civilians not heeding warnings to evacuate an area must be taken into account in the proportionality analysis. Nevertheless, on a practical level, if following warnings civilians evacuate a given area, then most of those remaining are fighting elements. This allows the attacker more freedom of action since, as discussed in III.A, this influences the implementation of the principle of proportionality, namely, the balance between the military advantage to be gained and the collateral damage anticipated from the attack.

Another aspect is the risk that the warning would lead, not to civilians evacuating the area, but to civilians gathering on, or in proximity to, the intended target in order to shield it. This raises controversial questions on the issue of voluntary human shields²⁴² and as to whether a commander might refrain from giving a warning when it is reasonably believed that such a warning would lead to civilians gathering in the planned target and hence would increase the danger to civilians instead of mitigating such peril. This article addresses neither of those questions.

IV. Conclusion

The duty to give civilians warning prior to attack is not new; however, its implementation has become more widespread and the scope and level of warnings given have increased in recent years. This is yet another reflection of the growing emphasis on protection for civilians and the avoidance, as much as possible, of civilian casualties. This emphasis is driven by legal, moral and policy considerations.

When State practice is viewed in this regard, Israeli practice, especially during the Lebanon conflict in 2006 and the Gaza operation of 2008–9, stands out. The scope and specificity of warnings given in these conflicts were unprecedented. Nevertheless, human rights institutions have found these warnings to be insufficient.

In order to analyze the components of the duty to give warnings one must first identify the aim of the obligation. Warnings are aimed at enabling civilians to protect themselves from the impending attack; hence no warning is needed when no civilians are anticipated to be physically harmed by the attack. The factual determination of when an attack may affect civilians in a way that requires a prior warning is based on the circumstances of the situation. In this context, understanding the uncertainties of armed conflict situations is important in order to appreciate and address the dilemmas faced by commanders. This understanding is also important for anyone wanting to make a fair after-the-fact evaluation of the fulfillment of the duty to issue a warning.

Warnings as a lawful measure to enhance the protection of civilians during armed conflict must be differentiated from unlawful threats aimed at terrorizing the civilian population and from unlawful ruses of war. The defining factor is the intention of the act. Even if warnings might indeed cause fear and apprehension, this does not make them unlawful unless their primary intention is to terrorize or mislead the population.

In order to achieve the aim of enabling civilians to protect themselves from attack, warnings must be effective. To be effective, warnings must fulfill various requirements.

First, from the temporal aspect, warnings must be given in a timely manner, not too close in time to the attack nor too early. When civilians are advised to evacuate a certain area, warnings must give them enough time to evacuate safely. If this is not possible, civilians should be cautioned to stay in place and take shelter instead of attempting to evacuate the area.

Second, with regard to recipients of warnings, in the past authorities of the other side were those to be warned. Although this is still a possibility, today warnings usually should be given directly to those civilians who might be affected by the attack.

Third, in order to be considered effective the content of the warning must be clear and sufficiently specific, although the required level of specificity is not easily determined. There could be cases when it would be necessary to repeat a warning more than once. In this context the Israeli practice of often providing multiple warnings of increasing specificity should not be regarded as setting a legal standard, due to the special circumstances of its operations and the significant policy considerations that were the basis of this practice. There is neither enough State practice nor *opinio juris* on which to base a customary rule with regard to specificity and number of warnings required. It is also highly doubtful that a legal obligation exists to notify civilians of the actions—evacuation, route to take, staying in place, etc.—they are to take upon receiving a warning. This seems, however, to be the expectation of human rights bodies, as exemplified in the reports prepared by those bodies on Israeli operations in the Gaza Strip and Lebanon.

Fourth, as to the method of the warning, there are different options available, ranging from leaflets and radio broadcasts to specific telephone calls. Warning shots may also be an option in certain cases, though there are those who disagree this is an appropriate method of giving warnings.

Once the components of the rule on warnings have been identified, the question of exceptions to the rule arises. Such exceptions include cases when surprise is necessary to achieve the goal of the mission, as well as cases where warnings would endanger the forces. In addition, warnings are not required prior to attack in

circumstances when there is no time to give such warnings, as a result of the nature of the attack, or for reasons making it impossible to provide warnings, such as in instances when no means of communication is available.

One of the concerns raised with regard to warnings is that after advising civilians to evacuate a certain area, military forces might consider anyone who did not evacuate as forfeiting civilian status and becoming a lawful attack objective. This, of course, is not the case and civilians who have not left the area must be taken into account in the proportionality analysis. Nevertheless, successful warnings that lead to most civilians leaving a combat area do allow military forces more freedom of action in the knowledge that less civilian collateral damage is expected. In today's asymmetrical battlefield, when fighters intermix with civilians and civilian localities are used as bases of operation, causing civilians to evacuate an area is one of the useful means available of minimizing civilian casualties. In that regard, warnings have become an important tool in promoting the protection of civilians on the one hand, while enhancing military freedom of action on the other. This demonstrates that the rules of the law of armed conflict are not necessarily a zero-sum game and warnings, as well as other precautionary measures, can be beneficial for all sides involved.

Notes

1. U.S. Department of War, Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, Apr. 24, 1863, *reprinted in* THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 3 (Dietrich Schindler & Jiri Toman eds., 4th ed. 2004), *available at* <http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument>. It is interesting to note that the code, known as the Lieber Code, was not necessarily followed during the Civil War. Thus, for example, Atlanta was attacked in August 1864 by General Sherman's army without warning even though it was full of non-combatants fleeing south before Sherman's final onslaught. General Hood later protested the action, asserting that notification was "usual in war among civilized nations." Sherman denied such an obligation existed. L. Lynn Hogue, *Lieber's Military Code and Its Legacy*, in FRANCIS LIEBER AND THE CULTURE OF THE MIND 57–58 C. C. Mack & H. H. Lesesne eds., 2004).

2. Project of an International Declaration Concerning the Laws and Customs of War, Aug. 27, 1874, 65 B.F.S.P. 1005, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 1, at 22, *available at* <http://www.icrc.org/ihl.nsf/FULL/135?OpenDocument>.

3. Article 33: "The commander of an attacking force, save in cases of open assault, shall, before undertaking a bombardment, make every due effort to give notice thereof to the local authorities." INSTITUTE OF INTERNATIONAL LAW, THE LAWS OF WAR ON LAND (1880), *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 1, at 29, *available at* <http://www.icrc.org/ihl.nsf/FULL/140?OpenDocument>.

4. Regulations Respecting the Laws and Customs of War on Land, annexed to Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2227, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 1, at 66 [hereinafter Hague Regulations]. This

rule appeared originally in Article 26 of the Convention with Respect to the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, 187 Consol. T.S. 429, *reprinted in id.* at 60.

5. A.P.V. ROGERS, *LAW ON THE BATTLEFIELD* 88 (2d ed. 2004); YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE INTERNATIONAL LAW OF ARMED CONFLICT* 144 (2d ed. 2010).

6. “If the military situation permits, the commander of the attacking naval force, before commencing the bombardment, must do his utmost to warn the authorities.” Convention Concerning Bombardment by Naval Forces in Time of War, Oct. 18, 1907, 36 Stat. 2351, 1 Bevans 681, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 1, at 1080. The words “except in the case of an assault,” as it appears in Article 26 of the 1907 Hague Regulations, might be regarded as more restrictive than “if the military situation permits.”

7. ROGERS, *supra* note 5, at 95 n.63.

8. LESLIE C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 156 (2d ed. 2000). This is also the conclusion of Hays Parks and is reflected in the instructions given by the British Air Ministry in 1940 during World War II, which limited the scope of the obligation to give warnings so as not to include aerial bombardments. Hays Parks, *Air War and the Law of War*, AIR FORCE LAW REVIEW 32, 46 n.181 (1990).

9. Jean-François Quéguiner, *Precautions under the Law Governing the Conduct of Hostilities*, 88 INTERNATIONAL REVIEW OF THE RED CROSS 793, 806 (2006), *available at* http://www.icrc.org/eng/assets/files/other/irrc_864_queguiner.pdf. *See also* Waldemar A. Solf, *Protection of Civilians against the Effects of Hostilities under Customary International Law and under Protocol I*, 1 AMERICAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLICY 117, 126 (1986).

10. ROGERS, *supra* note 5, at 95–96.

11. *See, e.g.*, PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, COMMENTARY ON THE HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE art. 37 commentary ¶ 2 (2010), *available at* <http://ihlresearch.org/amw/Commentary%20on%20the%20HPCR%20Manual.pdf> [hereinafter AMW COMMENTARY]. *See also* the discussion with regard to military manuals, *infra* pp. 363–64.

12. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 1, at 776 [hereinafter API]. According to the *Commentary* on API, during the negotiating process there were two proposals regarding the text. The one now in subparagraph (c) was adopted by the majority of delegations, but other delegations would have preferred the expression “whenever circumstances permit,” or even no derogation. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶ 2223 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987) [hereinafter API COMMENTARY]. It should be noted that API has not been ratified by such significant States as the United States and Israel; therefore they are only bound by the articles of the Protocol that represent customary international law.

13. 2 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 400 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter CIHLS II].

14. 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 62 (Rule 20) (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter CIHLS I].

15. Hays Parks contends that this article relaxed the warning requirement that appeared in the Hague Regulations, while simultaneously aligning it with the customary practice of nations in the twentieth century. Parks, *supra* note 8, at 46 n.181. According to the ICRC

study on customary international humanitarian law, this article reflects customary law. *Id.* It should be noted, however, that while this study is a useful indication of the law, it has been subject to substantial criticism and therefore cannot serve as the sole determining factor in assessing the law. See, e.g., PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Elizabeth Wilmschurst & Susan Breau eds., 2007) and the criticism expressed in the letter from John B. Bellinger III, Legal Adviser, US Department of State, and William J. Haynes, General Counsel, US Department of Defense, to Dr. Jacob Kellenberger, President, International Committee of the Red Cross (Nov. 3, 2006), 46 INTERNATIONAL LEGAL MATERIALS 514 (2007) [hereinafter Bellinger & Haynes letter].

16. According to the API COMMENTARY, *supra* note 12, ¶ 2191, the term “military operations” means any movements, maneuvers and other activities whatsoever carried out by the armed forces with a view to combat.

17. API, *supra* note 12, art. 49(3).

18. For the special rules on sea warfare, see INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW, SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA (L. Doswald-Beck ed., 1995), *reprinted in* DOCUMENTS ON THE LAWS OF WAR 573 (Adam Roberts & Richard Guelff eds., 3d ed. 2000) [hereinafter SAN REMO MANUAL]. See also US Navy, US Marine Corps & US Coast Guard, NWP 1-14M/MCWP 5-12.1/COMDTPUB P5800.7A, The Commander’s Handbook on the Law of Naval Operations ¶¶ 8.6.2, 8.9 (2007), *available at* <http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M> [hereinafter Commander’s Handbook]. As for the rules on warnings prior to attacking aircraft, see PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE rules 40, 57, 70, 156, 174 (2009) [hereinafter AMW MANUAL].

19. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 1, at 776.

20. Such an obligation is also absent, for example, in the *Manual on the Law of Non-International Armed Conflict* prepared by the International Institute of Humanitarian Law (except with regard to special cases such as hospitals). It does, however, refer to the other precautions included in API even though they are also not included in Additional Protocol II. MICHAEL N. SCHMITT, CHARLES H.B. GARRAWAY & YORAM DINSTEIN, THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT rule 2.1.2 (2006), *reprinted in* 36 ISRAEL YEARBOOK ON HUMAN RIGHTS (2006) (Special Supplement), *available at* <http://www.dur.ac.uk/resources/law/NIACManualIYBHR15th.pdf>.

21. CIHLS I, *supra* note 14, at 63–64. The ICRC relies, *inter alia*, on the International Criminal Tribunal for the former Yugoslavia decision in *Prosecutor v. Kupreskic*, Case No. IT-95-16-T, Judgment, ¶ 524 (Jan. 14, 2000). That decision, however, only refers in a general way to the applicability of Article 57 of API to non-international armed conflicts without any specific reference to the obligation to give warnings prior to attack.

22. The AMW Manual is an international manual that was written by a series of experts with a view to developing a manual similar to the *San Remo Manual* in order to seek to clarify the law applicable to air or missile operations in international armed conflict. See AMW COMMENTARY, *supra* note 11, at 1–7. See also, e.g., Charles Garraway, *The Use and Abuse of Military Manuals*, 7 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 425, 430 (2004).

23. AMW MANUAL, *supra* note 18, at 18 (emphasis added).

24. *Id.*, art. 38.

25. Convention Relative to the Protection of Civilian Persons in Time of War art. 19, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 1, at 580 (“The protection to which civilian hospitals are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy. *Protection may, however, cease only after due warning has been given, naming, in all appropriate cases, a reasonable time limit, and after such warning has remained unheeded.*” (emphasis added)). A similar rule appears in most military manuals.

26. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 21, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31, *reprinted in id.* at 461.

27. Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 34, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85, *reprinted in id.* at 487. *See also* SAN REMO MANUAL, *supra* note 18, art. 49.

28. API, *supra* note 12, art. 13; AMW MANUAL, *supra* note 18, rule 74.

29. API, *supra* note 12, art. 65; AMW MANUAL, *supra* note 18, rule 92.

30. Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 11(1), May 14, 1954, 249 U.N.T.S. 240, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 1, at 999; AMW MANUAL, *supra* note 18, rule 96.

31. AMW COMMENTARY, *supra* note 11, rule 38, ¶ 4.

32. *Id.*, ¶ 5.

33. *See* Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices arts. 4(2), 5(2), Oct. 10, 1980, 1342 U.N.T.S. 168; Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as Amended on May 3, 1996 arts. 3(10), 3(11), 6(4), May 3, 1996, 2048 U.N.T.S. 133. Taken together, these require that effective advance warning be given of any emplacement of mines, booby-traps and other devices that may affect the civilian population, unless circumstances do not permit.

34. *See supra* note 18. With regard to naval warfare, it is interesting to note that the *San Remo Manual* includes a duty to issue prior warnings before attacking a neutral merchant vessel or a neutral civilian aircraft in certain circumstances (Articles 67 and 70, respectively), but no such obligation is mentioned with regard to an attack on enemy merchant vessels or enemy civilian aircraft.

35. As Garraway notes, the word “manual” had been used to cover a multitude of different types of publications: those of an international nature (such as the *San Remo Manual*), national manuals and internal manuals (also referred to as “handbooks”). *See* Garraway, *supra* note 22, at 425–40. In this section we will, however, address only the last two types of manuals.

It should also be noted that manuals, as such, do not necessarily represent legal obligations. *See, e.g.,* Bellinger & Haynes letter, *supra* note 15. *See also* the discussion in NATIONAL MILITARY MANUALS ON THE LAW OF ARMED CONFLICT (Nobuo Hayashi ed., 2d ed. 2010), *available at* http://www.fichl.org/fileadmin/fichl/documents/FICHL_2_Second_Edition_web.pdf.

36. INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, JUDGE ADVOCATE GENERAL’S LEGAL CENTER AND SCHOOL, OPERATIONAL LAW HANDBOOK 21 (2010), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2010.pdf.

37. Commander’s Handbook, *supra* note 18. *See also* U.S. Department of the Air Force, AFP 110-31, International Law—The Conduct of Armed Conflict and Air Operations 5-11 (1976, designated obsolete Dec. 20, 1995) [hereinafter USAF Pamphlet].

38. UNITED KINGDOM MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT ¶ 5.32.8 n.209 (2004) [hereinafter UK MANUAL].

39. Quoted in CIHLS II, *supra* note 13, at 401, ¶ 431.

40. Office of the Judge Advocate General, Law of Armed Conflict at the Operational and Tactical Levels (2001), *available at* http://www.forces.gc.ca/jag/publications/Training-formation/LOAC-DDCA_2004-eng.pdf [hereinafter Canadian LOAC Manual].

41. Quoted in CIHLS II, *supra* note 13, at 402, ¶ 438.

42. *Id.* at 401–5, ¶¶ 427–63.

43. Additional examples appear in *id.* at 405–10, ¶¶ 465–88. It should be noted, however, that some of the examples included therein do not seem to be relevant to the issue at hand; for example, the reference to the warning of ships and aircraft by French armed forces (*id.* at 406, ¶ 467) or to warnings given by Iraq to ships approaching zones of operation in the Persian Gulf (*id.* at 406, ¶ 470).

44. ROGERS, *supra* note 5, at 88 nn.17, 18; Parks, *supra* note 8, at 157 n.467. Warnings were required in the instructions given by the British Air Ministry prior to naval bombardments, but not with regard to aerial attacks. *Id.* at 46 n.181.

45. USAF Pamphlet, *supra* note 37, at 5–11. *See also* Parks, *supra* note 8, at 157 n.467.

46. Parks, *supra* note 8, at 157 n.467.

47. Upon his refusal, the threat was carried out. GREEN, *supra* note 8, at 157 n.239; UK MANUAL, *supra* note 38, ¶ 5.32.8 n.209.

48. Parks, *supra* note 8, at 157 n.467.

49. GREEN, *supra* note 8, at 156.

50. API COMMENTARY, *supra* note 12, ¶ 2224. Parks notes, though, that such warnings were usually for the area to be raided rather than for the target per se. Parks, *supra* note 8, at 157 n.467.

51. API COMMENTARY, *supra* note 12, ¶ 2224.

52. ROGERS, *supra* note 5, at 94.

53. Parks, *supra* note 8, at 157 n.467.

54. Herbert A. Friedman, *The American PSYOP Organization during the Korean War* (2006), <http://www.psywarrior.com/KoreaPSYOPHist2.html>. In this article Stephen Pease explains that during the war

leaflets warning civilians to evacuate were dropped on Pyongyang, Chinnampo, Wonsan and Kanggye before major bombing strikes against fuel and ammo depots and railway yards. This was a “Plan Blast” mission, an attempt to reduce civilian casualties. It was also intended to lower morale and disrupt industrial production. In addition, the fleeing civilians would clog roads and delay the North Korean army.

55. CIHLS II, *supra* note 13, at 409, ¶ 485. *See also id.* at 408, ¶ 481.

56. Peter Rowe, *Kosovo 1999: The Air Campaign – Have the Provisions of Additional Protocol I Withstood the Test?*, 82 INTERNATIONAL REVIEW OF THE RED CROSS 147, 154 (2000).

57. AMNESTY INTERNATIONAL, “COLLATERAL DAMAGE” OR UNLAWFUL KILLINGS? VIOLATIONS OF THE LAWS OF WAR BY NATO DURING OPERATION ALLIED FORCE 15 (2000), *available at* <http://www.amnesty.org/en/library/asset/EUR70/018/2000/en/e7037dbb-df56-11dd-89a6-e712e728ac9e/eur700182000en.pdf> [hereinafter Amnesty International Report]. The report contends that NATO officials told Amnesty International in Brussels that as a general policy they chose not to issue warnings for fear that this might endanger the crew of attacking aircraft. *Id.* at 17. Schmitt notes that the criticism can only apply to strikes against fixed targets, since warnings in the case of movable targets or combatants would result in a failed mission as the targets would simply leave the area as soon as they received word of an impending attack. He claims that Amnesty International’s report ignored this military reality. Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VIRGINIA JOURNAL OF INTERNATIONAL LAW 796, 824 (2010).

58. International Criminal Tribunal for the former Yugoslavia, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (2000), *reprinted in* 39 INTERNATIONAL LEGAL MATERIALS 1257 (2000), available at <http://www.icty.org/x/file/Press/nato061300.pdf> [hereinafter Report to the Prosecutor on NATO Bombings].

59. Amnesty International Report, *supra* note 57, at 17, 45.

60. Report to the Prosecutor on NATO Bombings, *supra* note 58, ¶ 77.

61. Quéguiner, *supra* note 9, at 808. Amnesty International Report, *supra* note 57, at 45.

62. HUMAN RIGHTS WATCH, CIVILIAN DEATHS IN THE NATO AIR CAMPAIGN 30 (2000), available at <http://www.hrw.org/legacy/reports/2000/nato/>; Amnesty International Report, *supra* note 57, at 40, 45; Ove Bring, *International Law after Kosovo: Is Lex Lata Sufficient?*, 71 NORDIC JOURNAL OF INTERNATIONAL LAW 39, 46–47 (2002); Quéguiner, *supra* note 9, at 808–9. The Human Rights Watch report also refers to another case of an attack without prior warning—an airstrike on the New Belgrade Heating Plant on April 4, 1999. *Supra* at 24.

63. See, e.g., reports of the Marja area being “heavily leafleted” in order to warn civilians that an offensive is coming. Rod Nordland, *Military Officials Say Afghan Fight Is Coming*, NYTIMES.COM (Feb. 3, 2010), <http://www.nytimes.com/2010/02/04/world/asia/04taliban.html>. See also reports on dropping leaflets in the Arghanadab district. *Forces Ready to Push Back Taliban*, MILITARY.COM (June 17, 2008), <http://www.military.com/news/article/forces-readying-to-push-back-taliban.html#jivepostlink#community>.

64. See, e.g., Amnesty International, *Afghanistan: German government must investigate deadly Kunduz airstrikes* (Oct. 30, 2009), <http://www.amnesty.org/en/news-and-updates/news/afghanistan-german-government-must-investigate-deadly-kunduz-airstrikes-20091030>.

65. For example, in a report in *USA Today*, it was indicated that US planes dropped about two hundred thousand leaflets warning civilians to stay in their homes and assuring them that the campaign was not against them, but against Saddam. Gregg Zoroya & Vivienne Walt, *From the Battered Streets of Baghdad It's Clear: 'The Battle Has Reached Us,'* USA TODAY, Apr. 7, 2003, at 1A, available at http://www.usatoday.com/news/world/iraq/2003-04-06-baghdad-usat_x.htm. See also Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of War and the Struggle for a Moral High Ground*, 56 AIR FORCE LAW REVIEW 1, 52 & n.232 (2005).

66. Assessment and Analysis Division, U.S. Air Force Central, Operation IRAQI FREEDOM – By the Numbers (2003), available at http://www.globalsecurity.org/military/library/report/2003/uscentaf_oif_report_30apr2003.pdf.

67. See Jim Garamone, *Coalition Aircraft 'Paper' Iraq with Leaflets*, MILITARYINFO.COM (Mar. 19, 2003), http://www.militaryinfo.com/news_story.cfm?textnewsid=210. The article indicates that the two million leaflets dropped on March 19, 2003

warned Iraqis to stay away from military targets. They informed the Iraqi people that coalition forces do not wish to harm them. Leaflets also pointed to frequencies for Commando Solo broadcasts. Other leaflets stress that if Saddam Hussein uses chemical or biological weapons against the coalition, the main casualties will be Iraqi civilians. . . . DoD officials said they believe the leaflets are having an effect on the Iraqi population. News reports indicate that residents of Baghdad are taking the warnings seriously. Reporters are saying many Iraqis are sealing rooms in anticipation of a chemical or biological attack.

68. Descriptions and examples of such leaflets are available in Herbert A. Friedman, *No-Fly Zone Warning Leaflets to Iraq*, <http://www.psywarrior.com/IraqNoFlyZonecont.html> (last visited May 16, 2011) and Philip Shenon, *Attack on Iraq: The Overview; U.S. Reports Mixed Results*

on 89 Targets in Iraq, NYTIMES.COM (Dec. 19, 1998), <http://query.nytimes.com/gst/fullpage.html?res=9507E6DA163CF93AA25751C1A96E958260&pagewanted=1>.

69. 2 INDEPENDENT INTERNATIONAL FACT-FINDING MISSION ON THE CONFLICT IN GEORGIA, REPORT (2009), available at http://www.ceiig.ch/pdf/IIFFMCG_Volume_II.pdf [hereinafter Report on Georgia Conflict].

70. *Id.* at 197.

71. *Id.* at 347–48.

72. *Id.* at 349.

73. CIHLS II, *supra* note 13, at 406–7 ¶¶ 471, 473, 410 ¶ 489; Parks, *supra* note 8, at 166 & n.494.

74. See, e.g., Israel Ministry of Foreign Affairs, FAQ: The Second Lebanon War - One year later questions 16 & 17 (July 12, 2007), available at <http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terrorism+from+Lebanon-+Hizbullah/The%20Second%20Lebanon%20War%20-%20One%20year%20later%20-%20July%202007#protectlebanese> (then follow questions 16 and 17 hyperlink). For an overview of the Israeli position on the humanitarian aspects of the operation, see ISRAEL MINISTRY OF FOREIGN AFFAIRS, ISRAEL'S WAR WITH HIZBULLAH: PRESERVING HUMANITARIAN PRINCIPLES WHILE COMBATING TERRORISM (2007), available at <http://www.mfa.gov.il/NR/rdonlyres/74D04C9D-FA73-4A54-8CBA-DBCB1152C82E/0/DiplomaticNotes01.pdf>.

75. For a review of the early warnings, which included flyers, radio broadcasts and telephone communications utilized in Lebanon, see REUVEN ERLICH, HEZBOLLAH'S USE OF LEBANESE CIVILIANS AS HUMAN SHIELDS: THE EXTENSIVE MILITARY INFRASTRUCTURE POSITIONED AND HIDDEN IN POPULATED AREAS 53, 272–78 (2006), available at http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/human_shields_efs.pdf. For examples of leaflets, see Israel Ministry of Foreign Affairs, IDF warns Lebanese civilians to leave danger zones (July 25, 2006), <http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terrorism+from+Lebanon-+Hizbullah/IDF+warns+Lebanese+civilians+to+leave+danger+zones+3-Aug-2006.htm>. See also the description in Commission of Inquiry, *Report of the Commission of Inquiry on Lebanon Pursuant to Human Rights Council Resolution S-2/1*, at 39–41, ¶¶ 149–58, 97–99, U.N. Doc. A/HRC/3/2 (Nov. 23, 2006), available at <http://www.cggl.org/publicdocs/20061205HRC.pdf> [hereinafter UN Commission of Inquiry on Lebanon].

76. See Israel Ministry of Foreign Affairs, Summary of IDF operations against Hizbullah in Lebanon (July 13, 2006), <http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terrorism+from+Lebanon-+Hizbullah/IDF+operations+against+Hizbullah+in+Lebanon+13-Jul-2006.htm>. For an analysis of the attacks see, e.g., AMOS HAREL & AVI ISSACHAROFF, 34 DAYS: ISRAEL, HEZBOLLAH, AND THE WAR IN LEBANON 86 (2008); AMIR RAPPAPORT, FRIENDLY FIRE 15–16, 22, 28–30, 39, 113–15 (in Hebrew). The attacks were successful in eliminating the risk from the long-range missiles. In addition, the number of civilians killed in the attack was substantially lower than expected. See, e.g., HAREL & ISSACHAROFF, *supra*, at 79–81, 91–92.

77. An explanation of the rationale of the warning can be found in Israel Ministry of Foreign Affairs, Summary of IDF operations against Hizbullah in Lebanon (July 22, 2006), <http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terrorism+from+Lebanon-+Hizbullah/Summary+of+IDF+operations+against+Hizbullah+in+Lebanon+22-Jul-2006.htm> (“The objective of this warning is to try and avoid casualties among the civilian population of south Lebanon, an area used by Hizbullah terrorists who exploit the local population as human shields”). See also ERLICH, *supra* note 75, at 272, ¶¶ 2–3.

78. See ERLICH, *supra* note 75, at 273–74; UN Commission of Inquiry on Lebanon, *supra* note 75, at 39–42.

79. ERLICH, *supra* note 75, at 275–76.

80. For example, on July 22 the IDF spokesman stated:

In order to avoid unintentional harm to civilians during the operations, the IDF has called upon the Lebanese population in the villages detailed below to vacate the area and move north of the Litani River today. People who ignore this warning are endangering themselves and their families. The villages are: Tulla, Tallousse. . . . The aforementioned warning is still valid to the following villages: El Kutzer, Shakra. . . . This warning follows many previous warnings to the population in southern Lebanon, via leaflets, local officials and the Lebanese media, urging them to travel northward. The IDF's operations are directed solely at the terrorists, and not against the civilian population.

Israel Ministry of Foreign Affairs, Summary of IDF operations against Hizbullah in Lebanon (July 23, 2006), <http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terrorism+from+Lebanon-+Hizbullah/Summary+of+IDF+operations+against+Hizbullah+in+Lebanon+23-Jul-2006.htm>.

81. ERLICH, *supra* note 75, at 54. Similarly, as a result of the warnings, the vast majority of the civilians of the Dahiya neighborhood in Beirut left that neighborhood before the attacks.

82. The first report was prepared by a special mission composed of special rapporteurs. Special Rapporteurs, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council,"* U.N. Doc. A/HRC/2/7 (Oct. 2, 2006) (prepared by Philip Alston et al.), available at <http://www.mineaction.org/downloads/Emine%20Policy%20Pages/Human%20Rights%20Council%20Docs/Israel%20Lebanon%20Special%20Rapporteurs%20Report%20on%20Res.%2060%20251.pdf> [hereinafter UN Mission to Lebanon and Israel]. The second, by a commission of inquiry established by the Human Rights Council, was published on November 23, 2006. See UN Commission of Inquiry on Lebanon, *supra* note 75. Human Rights Watch also published a report critical of Israel, including with regard to warnings. See HUMAN RIGHTS WATCH, WHY THEY DIED: CIVILIAN CASUALTIES IN LEBANON DURING THE 2006 WAR 63–69 (2007), available at <http://www.hrw.org/en/reports/2007/09/05/why-they-died-0> (then Read the Report hyperlink). Most of its claims also appear in the UN reports and will be discussed in reference to those reports.

83. UN Mission to Lebanon and Israel, *supra* note 82, ¶ 36.

84. Most such operations were carried out in the Gaza Strip. In 2005 Israel disengaged from the Gaza Strip and its forces left this area. Later Hamas took over control of the Gaza Strip, driving out the more moderate Fatah government. Under Hamas' control, the Gaza Strip became a constant source of rocket attacks against Israeli localities. ISRAEL MINISTRY OF FOREIGN AFFAIRS, THE OPERATION IN GAZA: FACTUAL AND LEGAL ASPECTS (Part V.C) ¶¶ 36–66 (2009) [hereinafter Operation in Gaza: Conduct of the Operation], available at http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Operation_Gaza_factual_and_legal_aspects_use_of_force_IDF_conduct_5_Aug_2009.htm#C4b.

85. Warnings were also given during ground operations. One controversial measure was to request Palestinian residents to warn the inhabitants of a neighboring house prior to entry by Israeli forces. This procedure, which was called "the early warning procedure," was struck down by the Israeli High Court of Justice in H CJ 5100/94 Public Committee against Torture in Israel v. Israel [1999] IsrSC 53(4), reprinted in 38 INTERNATIONAL LEGAL MATERIALS 1471 (1999), available at http://elyon1.court.gov.il/files_eng/94/000/051/a09/94051000.a09.pdf. For an analysis of the decision, see Gabriella Blum, *The Laws of War and the "Lesser Evil,"* 35 YALE JOURNAL OF INTERNATIONAL LAW 1, 15–19 (2010). Warnings made under "the early warning procedure" will not be dealt with in this article.

86. This kind of warning was nicknamed “roof-knocking.” For a description, see Operation in Gaza: Conduct of the Operation, *supra* note 84, ¶ 264. In practice this method was rarely used prior to the Gaza operation of December 2008.

87. See *id.*, ¶¶ 155–89. See also Barry A. Feinstein, *Proportionality and War Crimes in Gaza under the Laws of Armed Conflict*, 36 RUTGERS LAW RECORD 224, 235–38 (2009).

88. Operation in Gaza: Conduct of the Operation, *supra* note 84, ¶¶ 263–64.

89. The text of these leaflets was as follows:

To the Residents of the Sajaiya Neighbourhood

The IDF continues to intensify its operations against Hamas terrorism and will attack any location in the Gaza Strip where terrorist operatives, tunnels or weapons are to be found. All residents of the Sajaiya Neighbourhood must leave their homes and move towards the Old City to the other side of Salah A'Din Road, with effect as of the distribution of this leaflet and by no later than 6 hours after the distribution of this leaflet.

These instructions are in force until further notice. Adherence to IDF instructions has prevented unnecessary casualties in the past.

Please continue to follow IDF instructions for your own safety.

IDF Command

Id. at 99 n.225.

90. *Id.*, ¶ 265.

91. 5 ISRAEL MINISTRY OF FOREIGN AFFAIRS, THE OPERATION IN GAZA: FACTUAL AND LEGAL ASPECTS (Part V.D) ¶¶ 388–91 (2009), available at http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Operation_Gaza_factual_and_legal_aspects_use_of_force_complaints_about_IDF_5_Aug_2009.htm.

92. *Id.*, ¶¶ 388–90.

93. Schmitt, *supra* note 57, at 828. See also Interview by BBC reporter with Colonel Richard Kemp, former commander of British forces in Afghanistan (Jan. 18, 2009), <http://www.youtube.com/watch?v=WssrKJ3lqcw> (stating that he doesn't “think there has ever been a time in the history of warfare when any army has made more efforts to reduce civilian casualties and deaths of innocent people than the IDF is doing today in Gaza”); David Graham, *The Changing Character of Tactics: Lawfare in Asymmetric Conflicts*, which is Chapter XI in this volume at 301, 307.

94. U.N. Human Rights Council, *Human Rights in Palestine and Other Occupied Arab Territories, Report of the United Nations Fact Finding Mission on the Gaza Conflict* ¶¶ 498–540, U.N. Doc. A/HRC/12/48 (Sept. 29, 2009) (Richard Goldstone), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf> [hereinafter Goldstone Report]. Amnesty International also published a report criticizing, *inter alia*, Israeli warnings during the operation. AMNESTY INTERNATIONAL, ISRAEL/GAZA – OPERATION ‘CAST LEAD’: 22 DAYS OF DEATH AND DESTRUCTION 50–51 (2009), available at <http://www.amnesty.org/en/library/asset/MDE15/015/2009/en/8f299083-9a74-4853-860f-0563725e633a/mde150152009en.pdf>. The main criticism in the report is that the general warnings received by people all over Gaza during the operation caused panic and were not effective since the civilians receiving them could neither leave Gaza nor find a place in Gaza where safety was guaranteed.

95. See, *inter alia*, Laurie R. Blank, *Finding Facts But Missing the Law: The Goldstone Report, Gaza and Lawfare*, 43 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW (forthcoming 2011); European Centre for Law and Justice, *Legal Memorandum Answering the UN Human Rights Council's Report on the Goldstone Fact-Finding Mission on the Gaza Conflict*, 40 ISRAEL YEARBOOK ON HUMAN RIGHTS (forthcoming 2011); Nicholas Rostow, *The Human*

Rights Council (Goldstone) Report and International Law, 40 ISRAEL YEARBOOK ON HUMAN RIGHTS (forthcoming 2011); Chatham House, Report of an Expert Meeting which Assessed Procedural Criticisms made of the UN Fact-Finding Mission on the Gaza Conflict (The Goldstone Report) (Nov. 27, 2009), available at http://www.chathamhouse.org.uk/files/15572_il271109summary.pdf.

96. One interesting example is the allegation concerning the attack on the el-Bader flour mill. According to the Goldstone Report the mill received two recorded messages, but these were not acted upon. Five days later the mill was struck with no warning. Goldstone Report, *supra* note 94, ¶¶ 502, 913–19. The Israeli military investigation found that the area of the mill was warned in advance since a ground operation was planned in this area. When the ground operation commenced several days after the warning, IDF troops came under fire and when they returned fire the mill was hit by tank shells. No additional specific warning was given since this was not a preplanned target. STATE OF ISRAEL, GAZA OPERATION INVESTIGATIONS: AN UPDATE ¶¶ 163–74 (2010), available at <http://www.mfa.gov.il/NR/rdonlyres/8E841A98-1755-413D-A1D2-8B30F64022BE/0/GazaOperationInvestigationsUpdate.pdf> [hereinafter Gaza Investigations Report First Update]. Interestingly, no civilians were hurt during the attack and only property was damaged; yet the complaints are made about the lack of warning. Goldstone Report, *supra*, ¶ 923. Another interesting feature of this case is the fact that the UN found an unexploded IAF bomb inside the mill, while amazingly there was no entry hole in the roof of the mill. This might indicate that the ordnance was planted there in order to incriminate Israel. STATE OF ISRAEL, GAZA OPERATION INVESTIGATIONS: SECOND UPDATE ¶¶ 141–45 (2010), available at <http://www.mfa.gov.il/NR/rdonlyres/1483B296-7439-4217-933C-653CD19CE859/0/GazaUpdateJuly2010.pdf>. This serves as yet another reminder of the caution required when making after-the-fact judgments.

97. For example, one commentator states: “In sum, on the issue of warning, the Goldstone Report badly distorts IHL’s [international humanitarian law’s] balance between military necessity and humanity. It imposes requirements that both have no basis in the law and which run counter to state practice and military common sense.” Schmitt, *supra* note 57, at 829.

98. Quéguiner, *supra* note 9, at 794.

99. API COMMENTARY, *supra* note 12, ¶ 2191.

100. DINSTEIN, *supra* note 5, at 138.

101. UK MANUAL, *supra* note 38, ¶ 5.32.8; USAF Pamphlet, *supra* note 37, at 5-11; CIHLS I, *supra* note 14, at 64; OPERATIONAL LAW HANDBOOK, *supra* note 36, at 21; CIHLS II, *supra* note 13, at 409, ¶ 484. Civilians do not include in this regard individuals who have lost their immunity from attack because they are directly participating in hostilities.

102. For example, in the Gulf conflict of 1991 Iraqi soldiers were warned in leaflets that their tanks were liable to be attacked, but that if the soldiers moved well clear of their tanks they would be safer. UK MANUAL, *supra* note 38, ¶ 5.32.8 n.207.

103. See reports regarding US psychological warfare in Iraq in note 68 *supra*.

104. API COMMENTARY, *supra* note 12, at 687, ¶ 2225. See also DINSTEIN, *supra* note 5, at 144, quoting Cassese: “Warnings are designed ‘to allow, as far as possible, civilians to leave a locality before it is attacked.’” Parks, *supra* note 8, at 158, states that “the reason behind the requirement for warning is to enable the Government controlling the civilian population to see to its evacuation from the vicinity of military objectives that might be subject to attack; it also permits individual civilians to remove themselves and their property from high-risk areas.”

105. UK MANUAL, *supra* note 38, ¶ 5.32.8.

106. CIHLS II, *supra* note 13, at 402, ¶ 438.

107. AMW COMMENTARY, *supra* note 11, at 133, ¶ 4.

108. Most reports of human rights organizations have also not suggested that warnings are required in such situations, although the Goldstone Report does link the obligation to issue a warning to the duty to minimize death or damage to civilians or “damage to civilian objects.” Goldstone Report, *supra* note 94, ¶ 527. The report does not elaborate what is meant by the reference to such damage in this context. See also IAN HENDERSON, *THE CONTEMPORARY LAW OF TARGETING: MILITARY OBJECTIVES, PROPORTIONALITY AND PRECAUTIONS IN ATTACK* 188 (2009), in which it is suggested that the term “affect” “should be interpreted narrowly to mean directly affected in the sense of injured or killed, as well as property damage.” The author does not explain this reference to property and stresses elsewhere that there is no obligation to issue warnings before attacking civilian objects. *Id.* at 185.

109. See, e.g., *Prosecutor v. Galić*, Case No. IT-98-29-T, Judgment, ¶ 58 (Int’l Crim. Trib. for the former Yugoslavia Dec. 5, 2003) (“In determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected civilian casualties to result from the attack.”). This standard—namely, that of “the information available to the person making the decision”—is used with regard to the implementation of the principle of proportionality; it also seems appropriate with regard to the implementation of the requirement to give effective warnings when circumstances permit. See also FRITS KALSHOVEN & LIESBETH ZEGVELD, *CONSTRAINTS ON THE WAGING OF WAR: AN INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW* 109 (3d ed. 2001); Parks, *supra* note 8, at 156; ROGERS, *supra* note 5, at 109–11.

110. A relevant example is the case in which a German officer ordered an airstrike against two fuel trucks which were stuck on a sandbank near the German camp in Kunduz, Afghanistan on September 4, 2009 during NATO operations. No advance warning was given prior to the attack by, for example, a low altitude flight over the trucks. Many civilians were killed in the attack. The German federal prosecutor investigated the case and decided that the officer was allowed to assume that there were no civilians present, and hence was not required to give a warning prior to the attack. Critics of this decision contend that the obligation to warn also exists in cases when there is doubt as to whether civilians are present; therefore refraining from giving a warning would have been justified only if the officer was absolutely sure that there were no civilians near the trucks. Constantin von der Groeben, *Criminal Responsibility of German Soldiers in Afghanistan: The Case of Colonel Klein*, 11 GERMAN LAW JOURNAL 469, 484 (2010).

111. This article represents customary international law. See, e.g., AMW MANUAL, *supra* note 18, rule 18; AMW COMMENTARY, *supra* note 11, at 102–3; CIHLS I, *supra* note 14, at 8 (rule 2). See also *Prosecutor v. Galić*, Case No. IT-98-29-A, Judgment, ¶ 104 (Int’l Crim. Trib. for the former Yugoslavia Nov. 30, 2006).

112. AMW COMMENTARY, *supra* note 11, at 134, ¶ 14.

113. In the US Navy’s handbook, the prohibition is limited to situations where spreading terror is the “sole” purpose of the attack. Commander’s Handbook, *supra* note 18, ¶ 8.9.1.2. In the AMW Commentary on rule 18, it is indicated that the majority of the Group of Experts did not agree with this limitation and believed the prohibition referred to activities in which the “sole or primary” purpose of the attack is that of spreading terror among the civilian population. AMW COMMENTARY, *supra* note 11, at 102.

114. Galić, *supra* note 111, ¶ 104.

115. DINSTEIN, *supra* note 5, at 126, emphasizes that “it is the intention that counts, and not the actual outcome of the attack.” See also API COMMENTARY, *supra* note 12, at 618; William J. Fenrick, *Symposium: Justice in Cataclysm Criminal Trials in the Wake of Mass Violence: Attacking*

the Enemy Civilian as a Punishable Offense, DUKE JOURNAL OF COMPARATIVE AND INTERNATIONAL LAW 539 (1997); Schmitt, *supra* note 57, at 818.

116. CIHLS I, *supra* note 14, at 65. The examples referred to in the study are of cases where it is alleged that civilians were told that all those left behind would be regarded as legitimate targets.

117. Applying this standard, the criticism of the wording of the warnings given by Israel in Lebanon does not seem justified. As mentioned earlier, the report prepared on behalf of the UN itself admits that the warnings “certainly saved many lives, both in south Beirut and south of the Litani River.” UN Mission to Lebanon and Israel, *supra* note 82, ¶ 36.

118. UN Commission of Inquiry on Lebanon, *supra* note 75, ¶ 206; UN Mission to Lebanon and Israel, *supra* note 82, ¶ 66. The latter report refers to the Guiding Principles on Internal Displacement, principle 6, which restates ICCPR Article 12, and to customary international humanitarian law. *Id.*, ¶ 66 n.81.

119. James G. Stewart, *The U.N. Commission of Inquiry on Lebanon*, 5 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 1039, 1054 (2007).

120. *Id.* The author notes that the commission “appears not to have considered whether portions of the displacement resulted from lawful evacuations or from civilians choosing to leave the region for fear of lawful hostilities.”

121. In this regard it may be noted that the UN reports admit that the warning saved many lives. See *supra* text accompanying note 83.

122. API COMMENTARY, *supra* note 12, at 687, ¶ 2225. See also DINSTEIN, *supra* note 5, at 144.

123. HENDERSON, *supra* note 108, at 188.

124. The Goldstone Report seems to set a questionable standard in asserting that “[a] credible warning means that civilians should be *in no doubt that it is intended to be acted upon*, as a false alarm or hoax may undermine future warnings, putting civilians at risk.” Goldstone Report, *supra* note 94, ¶ 528 (emphasis added). As Schmitt rightfully puts it: “For operational (or perhaps even humanitarian) reasons, some attacks are always canceled. No ground exists in international humanitarian law for charging the attacker with responsibility for countering the population’s reaction to the fact that warned attacks did not take place.” Schmitt, *supra* note 57, at 828.

125. This comports with the general understanding that those making decisions on precautions have to reach decisions on the basis of their assessment of the information that is available to them at the relevant time. See *supra* note 109.

126. ROGERS, *supra* note 5, at 100.

127. CIHLS II, *supra* note 13, at 401, ¶ 431. According to the Goldstone Report, the effectiveness of a warning depends on three considerations—the clarity of the message, the credibility of the threat and the possibility for those receiving the warning to take action to escape the threat. Goldstone Report, *supra* note 94, ¶ 511.

128. Parks, *supra* note 8, at 182–83, 201; ROGERS, *supra* note 5, at 117.

129. UK MANUAL, *supra* note 38, ¶ 5.32.8.

130. AMW COMMENTARY, *supra* note 11, at 133, ¶ 9, which states:

As for timing, an imprecise warning issued well in advance of the attack may be more effective than a precise warning immediately preceding it. Similarly, a warning issued well in advance of the attack—reaching only a certain part of the civilian population—may be more effective than one reaching the entire civilian population, which is issued just prior to the attack.

131. UK MANUAL, *supra* note 38, ¶ 5.32.8.

132. Quéguiner, *supra* note 9, at 808; Rowe, *supra* note 56, at 154. An example is the attack on the house of the Abu Askar family in the Gaza Strip. According to the Goldstone Report, Abu Askar received a telephone warning *only* seven minutes prior to the attack, though the report

acknowledges that all the residents of the building (around forty people) managed to evacuate on time and no one was hurt in the attack. Goldstone Report, *supra* note 94, ¶¶ 501, 656–57. The Israeli investigation showed that the house was used to store weapons and ammunition, including Grad rockets. Gaza Investigations Report First Update, *supra* note 96, ¶¶ 175–82. The warning given allowed enough time for all the residents of the building to safely evacuate on the one hand, without the weapons being moved out of the building on the other hand.

133. Bring, *supra* note 62, at 46–47; Quéguiner, *supra* note 9, at 808–9. See *supra* section II.A.3.

134. See discussion on the Lebanon War *supra* notes 77 and 78 and accompanying text. In its report on Sri Lanka, Human Rights Watch gives the example of an attack on Mutur on August 2, 2006. A Muslim community leader was warned that an attack would take place within an hour, but because electricity had been cut off he had no way of getting the notice to all the residents on time. HUMAN RIGHTS WATCH, IMPROVING CIVILIAN PROTECTION IN SRI LANKA 11 (2006), available at <http://www.hrw.org/en/reports/2006/09/19/improving-civilian-protection-sri-lanka>.

135. See *supra* section I.A.

136. The manuals which include specific reference to the civilian population as recipients of the warnings include, *inter alia*, those of Belgium, Croatia and France. The Australian manual specifies that warnings should be given to the “authorities or civilian population.” An exception is the Italian international humanitarian manual of 1991, which requires warning “the local authorities.” CIHLS II, *supra* note 13, at 401–2 ¶¶ 432, 436, 438, 431, 440, respectively.

137. AMW MANUAL, *supra* note 18, at 122 (rule 37).

138. See Theodor Meron, *The Humanization of Humanitarian Law*, 94 AMERICAN JOURNAL OF INTERNATIONAL LAW 239, 245 (2000).

139. ROGERS, *supra* note 5, at 100.

140. See *supra* text accompanying note 60. Israel too issued warnings to local authorities in Lebanon, though this was done in addition to the warnings to civilians and not instead of such warnings. See *supra* text accompanying note 78.

141. An interesting question is what happens when the authorities are duly warned and have the ability to pass the warning to the civilians but do not, in fact, warn them. This raises the question of the scope of the responsibility of one side to the conflict to the civilians of the other side. That question will not be dealt with here.

142. ROGERS, *supra* note 5, at 100. HENDERSON, *supra* note 108, at 188, cites an example from Operation Desert Storm, explaining that since the coalition purposefully disrupted the ability of the Iraqi authorities to communicate with the civilians, a warning to the central authority would not amount to an effective warning to civilians, especially those in remote regions.

143. AMW COMMENTARY, *supra* note 11, at 133, ¶ 5. There was also disagreement on a related question of the geographic extent to which the warning must apply. *Id.*, ¶ 8.

144. See Commander’s Handbook, *supra* note 18, ¶ 8.9.2. Italy’s LOAC Elementary Rules Manual (1991) states: “When the mission permits, appropriate warning shall be given to civilian populations endangered by the direction of attack or by their proximity to military objectives.” CIHLS II, *supra* note 13, at 402, ¶ 441; Croatia’s Commanders’ Manual (1992) has an identical formulation, *id.*, ¶ 436; Ecuador’s Naval Manual (1989) states: “When circumstances permit, advance warning should be given of attacks that might endanger noncombatants in the vicinity . . .” *Id.*, ¶ 437.

145. AMW COMMENTARY, *supra* note 11, at 133, ¶ 8.

146. Operation in Gaza: Conduct of the Operation, *supra* note 84, ¶ 263.

147. HENDERSON, *supra* note 108, at 187.

148. Such situations, which are not rare in armed conflict, must be differentiated from cases when warnings are given without any intention to attack. These might amount to unlawful ruses. See *supra* text accompanying notes 122 and 123.

149. UK MANUAL, *supra* note 38, ¶ 5.32.8.

150. ROGERS, *supra* note 5, at 100; AMW COMMENTARY, *supra* note 11, at 133, ¶ 12.

151. The Goldstone Report notes that Israel declared in the midst of the operation that it would attempt to improve the clarity of warnings. Goldstone Report, *supra* note 94, ¶¶ 524–25. The report indicates this proves that the “circumstances almost certainly permitted much better warnings to be given than was the case.” Arguably, the Israeli step could be viewed as a reflection of the uncertainty which existed in the initial stages of the operation.

152. *Id.*, ¶ 542.

153. In this context, Yuval Shany notes that “[t]he committee refers to the dangerous and confusing circumstances prevailing in Gaza during the operation, not to lighten the burden imposed on the Israeli military as the language of article 57(2) seems to suggest, but rather to underscore Israel’s duty to provide clearer warnings.” Yuval Shany, Human Rights and Humanitarian Law as Competing Legal Paradigms for Fighting Terror (Hebrew University International Law Research Paper No. 23-09, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1504106 (then One-Click Download hyperlink).

154. *Id.* In this regard, see also Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflicts*, 98 AMERICAN JOURNAL OF INTERNATIONAL LAW 1, 32–33 (2004); Naz K. Modirzadeh, *The Dark Sides of Convergence: A Pro-civilian Critique of the Extraterritorial Application of Human Rights Law in Armed Conflict*, in THE WAR IN IRAQ: A LEGAL ANALYSIS 349, 362–67 (Raul A. “Pete” Pedrozo ed., 2010) (Vol. 86, US Naval War College International Law Studies); Françoise J. Hampson, *Is Human Rights Law of Any Relevance to Military Operations in Afghanistan?*, in THE WAR IN AFGHANISTAN: A LEGAL ANALYSIS (Michael N. Schmitt ed., 2009) (Vol. 85, US Naval War College International Law Studies).

155. AMW MANUAL, *supra* note 18, rule 37.

156. AMW COMMENTARY, *supra* note 11, at 133, ¶ 10.

157. UK MANUAL, *supra* note 38, ¶ 5.32.8.

158. DINSTEIN, *supra* note 5, at 144; Quéguiner, *supra* note 9, at 807.

159. CIHLS I, *supra* note 14, at 65; CIHLS II, *supra* note 13, at 409, ¶¶ 483, 485, for a statement on the US position.

160. API COMMENTARY, *supra* note 12, ¶ 2225.

161. OPERATIONAL LAW HANDBOOK, *supra* note 36, at 21. See also USAF Pamphlet, *supra* note 37, at 5-11; Commander’s Handbook, *supra* note 18, ¶ 8.9.2.

162. CIHLS II, *supra* note 13, at 409, ¶ 483.

163. Quéguiner, *supra* note 9, at 808.

164. UK MANUAL, *supra* note 38, ¶ 5.32.8.

165. These two factors appear in the AMW Commentary. AMW COMMENTARY, *supra* note 11, at 133, ¶ 7.

166. See *infra* section III.E.1.1–2.

167. Operation in Gaza: Conduct of the Operation, *supra* note 84, ¶ 263.

168. Goldstone Report, *supra* note 94, ¶ 536.

169. Schmitt, *supra* note 57, at 828.

170. For an example of circumstances in which policy reasons may impact targeting decisions, see Commander’s Handbook, *supra* note 18, ¶ 8.3.2. As for moral considerations, we will not enter into a discussion of the complex relationship between moral and legal aspects that occur during armed conflict.

171. Such considerations led, for example, to the imposing of strict limitations on the use of force by coalition forces in Afghanistan. Michael N. Schmitt, *Targeting and International Humanitarian Law in Afghanistan*, in *THE WAR IN AFGHANISTAN: A LEGAL ANALYSIS*, *supra* note 154, at 307, 312–14. *See also* Laurie Blank & Amos Guiora, *Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflict in New Warfare*, 1 *HARVARD NATIONAL SECURITY JOURNAL* 45, 67–68 (2010).

172. *See, e.g.*, DANI HALOUTZ, *STRAIGHTFORWARD* 424–25 (2010) (in Hebrew). The author, who was the Israeli Chief of Staff during the Second Lebanon War, notes that during the conflict in Lebanon there was always a concern that attacks accidentally leading to significant civilian casualties might seriously affect the international response to Israeli actions and affect the continuance of the operation. This concern materialized in the case of the attack on the village of Qana, where the high number of casualties and the ensuing reactions against Israel led to a decision by the Israeli Prime Minister to limit Air Force attacks for the subsequent forty-eight hours. *See also* RAPPAPORT, *supra* note 76, at 203–4.

173. The Goldstone Report recognizes some unique characteristics possessed by Israel relevant to the evaluation of the effectiveness of the warnings, including the extensive preparations for the operation, intimate knowledge of Gaza, sophisticated intelligence, access to telephone networks and domination of the airspace. Goldstone Report, *supra* note 94, ¶ 509.

174. *See also* Schmitt, *supra* note 171, at 328–29.

175. Report on Georgia Conflict, *supra* note 69, ¶¶ 347–48.

176. Quéguiner, *supra* note 9, at 808.

177. *Id.*

178. *Id.*

179. *Id.*

180. UN Commission of Inquiry on Lebanon, *supra* note 75, ¶ 157.

181. Goldstone Report, *supra* note 94, ¶ 530.

182. Schmitt, *supra* note 57, at 827.

183. *OPERATIONAL LAW HANDBOOK*, *supra* note 36, at 21; USAF Pamphlet, *supra* note 37, at 5–11; Commander's Handbook, *supra* note 18, ¶ 8.9.2.

184. Parks, *supra* note 8, at 158; API, *supra* note 12, art. 58. API COMMENTARY, *supra* note 12, ¶¶ 2244, 2257.

185. *See also* Section H of the *AMW Manual* dealing with passive precautions. *AMW MANUAL*, *supra* note 18. *See also* the *CIHL* regarding precautions against attacks, where it is noted:

Practice has shown that the construction of shelters, digging of trenches, distribution of information and warnings, withdrawal of the civilian population to safe places, direction of traffic, guarding of civilian property and the mobilization of civil defence organizations are measures that can be taken to spare the civilian population and civilian objects under the control of a party to the conflict.

CIHLS I, *supra* note 14, rule 22.

186. The bombing of the Serbian television and radio station discussed in the report to the prosecutor with regard to the NATO bombings in Kosovo provides an example. In that case, Yugoslav authorities knew of the attack and could have warned the occupants of the station. The report concluded that because of that knowledge NATO authorities were not expected to issue more concrete warnings. Report to the Prosecutor on NATO Bombings, *supra* note 58, ¶ 78. *See, in a similar context*, Eyal Benvenisti, *Human Dignity in Combat: The Duty to Spare Enemy Civilians*, 39 *ISRAEL LAW REVIEW* 81, 89–90 (2006).

187. In this regard, see, for example, the *Isayeva* case, in which the European Court of Human Rights criticized a Russian operation in Katyr-Yurt in Chechnya. The Court analyzed the attack using human rights law applicable to law enforcement situations and concluded that the Russian military in the planning stage did not make serious calculated arrangements for the evacuation of civilians “such as ensuring that they were informed of the attack beforehand, [determining] how long such an evacuation would take, [determining] what routes evacuees were supposed to take,” etc. The Court found this to be a violation of Article 2 (the right to life) of the European Convention on Human Rights. *Isayeva v. Russia*, App. No. 57950/00, 41 Eur. Ct. H.R. Rep. ¶¶ 185, 187, 191 (2005). For an analysis, see William Abresch, *A Human Rights Law of Internal Armed Conflict: the European Court of Human Rights in Chechnya*, 16 EUROPEAN JOURNAL OF INTERNATIONAL LAW 741 (2005).

188. See, e.g., articles cited *supra* in note 154. See also Modirzadeh, *supra* note 154, at 349.

189. AMW COMMENTARY, *supra* note 11, at 134, ¶ 13.

190. UK MANUAL, *supra* note 38, ¶ 5.32.8.

191. *Id.*

192. ROGERS, *supra* note 5, at 115.

193. API COMMENTARY, *supra* note 12, ¶ 2224.

194. *Id.*, ¶ 2224; AMW COMMENTARY, *supra* note 11, at 133, ¶ 9.

195. AMW COMMENTARY, *supra* note 11, at 134, ¶ 15.

196. See also the manuals of Kenya and of Nigeria in CIHLS II, *supra* note 13, at 403, ¶¶ 442, 447.

197. AMW COMMENTARY, *supra* note 11, at 133, ¶ 11.

198. See, e.g., CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, I LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ 107–8 (2004), available at <http://www.fas.org/irp/doddir/army/clamo-v1.pdf>. With regard to warning shots used to enforce a maritime blockade, see the analysis in Public Commission to Examine the Maritime Incident of 31 May 2010, *Report of the Public Commission to Examine the Maritime Incident of 31 May 2010 – Part One* ¶ 179 (Jan. 2010 (*sic*)), available at <http://www.turkel-committee.gov.il/files/wordocs/8808report-eng.pdf>.

199. Operation in Gaza: Conduct of the Operation, *supra* note 84, ¶ 264.

200. Goldstone Report, *supra* note 94, ¶ 533.

201. Military objectives also include civilian infrastructure and buildings which by their “nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.” API, *supra* note 12, art. 52(2).

202. Schmitt, *supra* note 57, at 829. Schmitt also points out that, since prior to the warning shots civilians were usually warned by phone or by other means, “their failure to heed the warning cannot possibly be understood to create a continuing duty to warn.” Once warned effectively, the requirement has been met even if the warning shots themselves could not be regarded as lawful warnings.

203. See *supra* sections I.B.1 and I.C. Italy’s IHL Manual of 1991 includes an exception “in case of military necessity.” CIHLS II, *supra* note 13, at 402, ¶ 441.

204. France’s LOAC Summary Note of 1992, *id.* at 402, ¶ 438. See also the manuals of Italy, *id.*, ¶ 441, and Madagascar, *id.* at 403, ¶ 443.

205. Kenya LOAC Manual (1997), *id.* at 403, ¶ 442. See also the manuals of Nigeria, *id.*, ¶ 447, and Togo, *id.* at 404, ¶ 452.

206. Surprise, as conditioning the need to warn, appears as early as the 1862 Lieber Code, *supra* note 1, and then in all the following instruments. See *supra* texts in section I.A.1.

207. DINSTEIN, *supra* note 5, at 144.
208. *Id.*
209. Parks, *supra* note 8, at 46 n.181.
210. UK MANUAL, *supra* note 38, ¶ 5.32.8; API COMMENTARY, *supra* note 12, ¶ 2223; AMW COMMENTARY, *supra* note 11, at 133, ¶ 6; CIHLS I, *supra* note 14, at 64; OPERATIONAL LAW HANDBOOK, *supra* note 36; DINSTEIN, *supra* note 5, at 144; Quéguiner, *supra* note 9, at 807. The Goldstone Report also acknowledges that surprise in the initial strikes might justify not giving an advance warning. Goldstone Report, *supra* note 94, ¶ 510.
211. HENDERSON, *supra* note 108, at 186.
212. See *supra* text accompanying note 76.
213. Henderson suggests that a better term than “inconvenient” would be “disadvantageous.” HENDERSON, *supra* note 108, at 186.
214. API COMMENTARY, *supra* note 12, ¶ 2223 (emphasis added).
215. CIHLS I, *supra* note 14, at 64 (emphasis added).
216. AMW COMMENTARY, *supra* note 11, at 133, ¶ 6 (emphasis added).
217. UK MANUAL, *supra* note 38, ¶ 5.32.8; Belgium’s 1983 manual also uses the term “crucial element for the success of the attack.” CIHLS II, *supra* note 13, at 401, ¶ 432.
218. OPERATIONAL LAW HANDBOOK, *supra* note 36, at 21. South Africa’s manual of 1996 also uses the phrase “if surprise is a key element of attack.” CIHLS II, *supra* note 13, at 403, ¶ 448. The US naval handbook refers to cases where the success of the mission is “placed in jeopardy.” Commander’s Handbook, *supra* note 18, ¶ 8.9.2. Yugoslavia’s YPA Military Manual of 1988 uses similar wording: “jeopardize the military operation.” CIHLS II, *supra*, at 405, ¶ 458. In Ecuador’s Naval Manual of 1989 the wording is “if mission accomplishment requires the element of surprise.” *Id.* at 402, ¶ 437. Canada’s 1999 manual states that “[f]or tactical reasons, an attacking force may not give a warning in order to maintain the element of surprise.” Canadian LOAC Manual, *supra* note 40, ¶ 435.
219. CIHLS II, *supra* note 13, at 409, ¶ 484 (emphasis added).
220. Quéguiner, *supra* note 9, at 807 (emphasis added). Henderson quotes Oeter, who states that a warning need not be given where “the specific circumstances of the planned operation do not make it possible to inform the defender because the purpose of the operation could not then be achieved.” HENDERSON, *supra* note 108, at 187.
221. According to the ICRC’s IHL study, State practice considers that a warning is not required when surprise is essential to “the security of the attacking forces or that of friendly forces.” CIHLS I, *supra* note 14, at 64.
222. AMW COMMENTARY, *supra* note 11, at 133, ¶ 6.
223. Amnesty International criticizes this position and asserts that
[g]iven all the other measures taken in order to avoid NATO casualties (including high-altitude bombing), one might question whether sparing civilians was given sufficient weight in the decision not to give warnings. Nor does the consideration of pilot safety explain why there was no warning to civilians when Cruise missiles were used in attacks.
Amnesty International Report, *supra* note 57, at 17.
224. ROGERS, *supra* note 5, at 115. Henderson notes that it is not enough that the other side does not have a significant air force; there must also be a lack of surface-to-air threat. HENDERSON, *supra* note 108, at 187.
225. UK MANUAL, *supra* note 38, ¶ 5.32.8 (emphasis added); Ecuador’s Naval Manual of 1989 uses similar wording. CIHLS II, *supra* note 13, at 402, ¶ 437. See also Aide-Mémoire for IFOR Commanders (1995) of the Netherlands. *Id.* at 403, ¶ 445.

226. Commander's Handbook, *supra* note 18, ¶ 8.9.2 (emphasis added). The provision refers to issuing general warnings instead of specific warnings, but is also relevant in determining when no warning will be given.

227. CIHLS II, *supra* note 13, at 409, ¶ 484 (emphasis added).

228. See, e.g., Noam Neuman, *Applying the Rule of Proportionality: Force Protection and Cumulative Assessment in International Law and Morality*, 7 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 79 (2004); Benvenisti, *supra* note 186, at 89–90, 93–97; Michael N. Schmitt, *Fault Lines in the Law of Attack*, in TESTING THE BOUNDARIES OF INTERNATIONAL HUMANITARIAN LAW 277, 296–98 (Susan Breau & Agnieszka Jachec-neale eds., 2006). See also the views of Walzer in MICHAEL WALZER, JUST AND UNJUST WARS 151, 155 (1977).

229. UK MANUAL, *supra* note 38, ¶ 5.32.8.

230. CIHLS I, *supra* note 14, at 64. In CIHLS II, *supra* note 13, at 407, ¶ 473, the report of the practice of Israel in 1997 refers to cases of counterfire, explaining that there is no possibility to issue advance warning in such cases. The UK MANUAL, *supra* note 38, ¶ 5.32.8, refers to cases where military forces unexpectedly come across a target. See also Schmitt, *supra* note 57, at 824.

231. UK MANUAL, *supra* note 38, ¶ 5.32.8.

232. Joint Chiefs of Staff, Joint Publication 1-02, Department of Defense Dictionary of Military and Associated Terms 374 (as amended through Dec. 31, 2010), available at http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf.

233. Another example is enemy combatants identified by opposing military forces. See the analysis of von der Groeben, *supra* note 110, at 485, discussing the possibility of an attack aimed at Taliban fighters.

234. The example of the attack on the el-Bader flour mill demonstrates this difference between preplanned attacks and “immediate” targets. See *supra* note 96.

235. UK MANUAL, *supra* note 38, ¶ 5.32.8; Commander's Handbook, *supra* note 18, ¶ 8.9.2; USAF Pamphlet, *supra* note 37, at 5-11.

236. ROGERS, *supra* note 5, at 100, 110.

237. Goldstone Report, *supra* note 94, ¶ 527.

238. Schmitt, *supra* note 57, at 827–28.

239. *Id.* Schmitt also points out that warnings must be issued even if the collateral damage expected in the absence of a warning would not be excessive in relation to the anticipated military advantage and even if they are unlikely to minimize harm to civilians and civilian objects (as in the case of regularly unheeded warnings). Thus, the position proffered in the report paradoxically sets a lower humanity threshold than required by international humanitarian law.

240. CIHLS I, *supra* note 14, at 65. The UN Reports on Lebanon also emphasize that the responsibility to distinguish between combatants and civilians is not discharged by warning civilians that they will be targeted. Civilians are not obligated to comply with warnings given and “a decision to stay put, freely taken or due to limited options, in no way diminishes a civilian's legal protections.” UN Mission to Lebanon and Israel, *supra* note 82, ¶ 41. Conversely, see the position of Hays Parks in Parks, *supra* note 8, at 158 n.469.

241. AMW COMMENTARY, *supra* note 11, at 134, ¶ 16.

242. A good analysis is found in Michael N. Schmitt, *Human Shields in International Humanitarian Law*, 47 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 292 (2009).

PART VIII

**THE CHANGING CHARACTER OF LEGAL
SCRUTINY: RULE SET, INVESTIGATION, AND
ENFORCEMENT IN ASYMMETRICAL
CONFLICTS**

XV

The Changing Character of Public Legal Scrutiny of Operations

Rob McLaughlin*

Introduction

The issue of legal scrutiny of operations is ultimately a synthesis of many individual developments in the conduct and monitoring of operations generally. Over the last two or three decades in particular, the practice of operations law has evolved in response to an intricate web of related developments—in the law itself, or in its interpretation; in technology (in terms of both conduct of operations and monitoring of operations); and in the capacities of accountability agents. The consequence is, quite naturally, significantly greater scrutiny. There are few nations currently engaged in International Security Assistance Force (ISAF) operations in Afghanistan, for example, that have not faced the very public dissection and deconstruction of their legal responses to discrete operational incidents. This is most certainly not a development to be lamented; indeed it is to be greatly lauded. But this overwhelmingly positive development should not disguise the tensions—and flaws—that can result from rapid evolution in any ecosystem. In this short introduction to the changing character of legal scrutiny, I will briefly overview three particular factors in this evolution—the enablers of law, technology and the capacities of accountability agents—and make some short general observations on the potential implications of this evolution for military operations. My focus is upon the effects of these developments on public legal scrutiny, rather than the internal

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or organic legal scrutiny that for most States has long been an integrated component of the conduct of military operations.

Enablers: Law

Clearly, greater definition or certainty in the law applicable to any given military operation is a positive development. This should not disguise, however, the inalienable fact that greater ultimate precision in the law comes at the price of uncertainty during the evolutionary process of establishing and implementing those interpretations while simultaneously conducting operations in which that newly minted law or interpretation or guidance is clearly applicable and is being applied. As other articles in this volume clearly attest, there is no settled view—nor even a predominant view—among and between academics, non-governmental organizations (NGOs), inter-governmental organizations, the International Committee of the Red Cross and individual States on the scope and application of the concept of targetable members of an organized armed group in the context of non-international armed conflicts.¹ Yet this substantive legal concept is evolving as it is applied in operations such as those of ISAF in Afghanistan. Clearly, developments in the way this concept is interpreted and applied are not yet finalized or settled. Actions and incidents are nevertheless being held to account against the concept—in its myriad forms and interpretations—contemporaneously with the wider general debate as to what is, precisely, the correct interpretation and application. The obvious—but highly significant and operationally challenging—consequence is that an NGO, for example, will analyze an operational incident against one interpretation of the evolving law or appreciation of the law, whereas a State may well be analyzing the same incident in light of a different interpretation and differing State practice in relation to the very same law. Clearly, the scope for differential appreciation, confusion and antagonism is plainly evident.

The notion of direct participation in hostilities, and the subdivision of this concept into ad hoc and organized armed group components, is but one of the more obvious current manifestations of this phenomenon. Whether an improvised-explosive-device maker killed in an attack was killed in accordance with the law of armed conflict (LOAC) (that is, as a targetable member of an organized armed group) or murdered (a civilian who was not within the targetable envelope) is a fundamental fracture point.

Another example, in relation to collateral damage mitigation and weapon-
eering, may similarly assist in illustrating this point. It was recently reported that a US Army field artillery regiment in Afghanistan had developed a method of mitigating potential collateral damage when undertaking fire support missions by

using less-explosive training ammunition during the “adjustment phase.”² As the report makes clear, however, this is a “moral and strategic choice within a counter-insurgency environment.”³

It is important to emphasize that this innovation is a contextual—not universal—amendment to what is to be considered as feasible in relation to precautions in attack and collateral damage mitigation. The potential exists, however, for one party in a debate to assert, with strong reasoning, that this innovation should now become the norm across all operations. Another party to the debate may well wish to emphasize, on the basis of equally sound reasoning, that this innovation is a choice available only in limited situations and a choice that is dependent upon terrain, ballistic conditions, availability, strategy and so on.

The message is clear, however: the significantly broader availability of detailed information and the vastly expanded opportunities for debate as to “the law” by reference to that information have increased the depth, scope and occurrence of public legal scrutiny of operations. The reverse side of this development is that the language of the applicable law—most particularly LOAC—can be very publicly misused so as to provide an aura of incontestability or authority to an otherwise weak statement or analysis. Stating an opinion, without proper analysis, that a particular effect was “disproportionate” carries with it very strictly defined and significant legal context and implications, even if the user of the term was employing it in a colloquial, ethical or moral sense.

A second aspect of the evolution of law as a component of increasing legal scrutiny of operations is the role of law itself in terms of the manner in which that scrutiny is conducted. Public debates on operational incidents are today generally conducted within a legal framework: the language used is drawn from the law (albeit specific terms or concepts are occasionally improperly used or explained, sometimes undermining the ultimate quality of the analysis, and thus the scrutiny); the investigative and enforcement paradigms utilized are bounded by law; and the consequences are often expressed in terms of the law. It is notable, for example, how interpretation of the applicable law—and the legal framework—dominated public debate (in political, media and civil society arenas) in Australia and the United Kingdom in the lead-up to operations in Iraq in 2003.⁴ Similarly, the most accessible and public resort to complaint in relation to operational incidents is increasingly through and via the law.

This is evident on several levels. On a limited, very individual level, one example is the significant recent media attention surrounding litigation commenced by a British army sniper against the UK Ministry of Defence (MoD) for failing to ensure that his identity was protected after he gave an interview (that was approved and monitored by MoD officials who had told him his identity would be protected). He

and his family have since been required to relocate as they were assessed to be at high risk of kidnap or targeting by militants.⁵

On a broader scale, law and legal process have also been used to invite wider public scrutiny of operations through public interest channels able to access the mechanisms of judicial review. On the basis of publicly available information and other information originally released to her by the MoD, Maya Evans—described in some media as “an anti-war activist”—was able to agitate for judicial review of ten specific detainee transfers (from UK forces serving within ISAF to Afghan government authorities) so as to ensure that detention operations in general were subject to additional public legal scrutiny.⁶ This is, very clearly, a positive development: authoritative and public legal determinations on detailed matters of direct operational concern, where those determinations are made on the basis of accurate information and with contextual appreciation, will generally generate more directly and operationally useful guidelines and instructions. Similarly, authoritative determinations that generally endorse current practice and legal risk mitigation strategies (as was the case in this litigation), while perhaps not as newsworthy as condemnatory decisions, are nonetheless often as useful as such condemnatory decisions. It is sometimes as edifying and important to the practice of operational law to know what we are getting right as it is to know what we have got wrong.

Enablers: Technology

Technology functions as a similarly bivalent force in the evolution of legal scrutiny of operations. On one level, technology in operations raises myriad questions about contemporaneous or simultaneous legal scrutiny, most particularly in relation to means and methods of warfare and precautions in attack. One example is the fact that public perceptions as to both the efficacy of precision-guided munitions (PGMs) and their ubiquity in modern operations are often at odds with operational reality. This disjuncture is thoroughly problematic in terms of legal scrutiny. Regardless of best intentions, it must be accepted that non-State accountability agents who analyze weapons incidents may—or equally may not—be applying an accurate understanding of the capabilities, limitations, employment parameters and effects of such weapons or of their place in broader systems of assessment, weaponeering and targeting. All of these factors will influence the effect of a discrete weapon in any given context, and all of these factors—as increasingly publicly available information—can be built into (and misapplied in the course of) significantly more detailed alternative legal assessments and scrutiny. Perhaps the most telling recent example was the public misappreciation of at least some incidents during the Kosovo conflict where debate over launching weapons from altitude,

insofar as it related to precision-guided munitions and the altitudes associated with increased accuracy of some PGMs, clearly evidenced well-intentioned but ultimately inaccurate legal assessments by some accountability agents.⁷

Technology also plays a significant role in terms of the quantity and—but not always positively—quality of information available to both commanders and scrutinizers of operations. One example is the detailed analysis by Human Rights Watch (HRW) of a US and Afghan forces engagement in Azizabad in Afghanistan on August 21–22, 2008. In a letter to Secretary of Defense Robert Gates, HRW investigators reported, on the basis of their assessment of what the technology could do and thus what it should have told US forces about events in the village, that

[i]t is, therefore, questionable that the close proximity of insurgent forces to civilians was “unknown” to US and Afghan forces; if it was unknown, then the quality of US intelligence was shockingly poor. . . .

*Given what could be expected to have been known about the large civilian population in the village at the time, conducting airstrikes over several hours that destroy or damage 12 to 14 houses in the middle of the night makes high civilian casualties almost inevitable.*⁸

As is a risk with all assessments completed in hindsight, the factor that comes to dominate when a tragedy occurs may now appear glaringly obvious and thus be attributed significant weight in assessing both the aftermath and apportionment of blame. At the time, however, it may have been but one factor among a multitude of noisy competing pieces of information, each of which would have been colored by differential quality tags and unknown levels of perishability, and subject to the compressed time frames of operational decision making. The piece of information in question may not, at the time the decision was actually made, have held such a dominant place in the lexicon surrounding the incident. Not all mistakes are the result of intentional disregard, recklessness or negligence. Sometimes mistakes are simply the result of decisions that were at the time legitimately made (and thus of continuing lawfulness) from within a swirl of information of highly variable and occasionally unknown quality and corroboration. Mistake does not necessarily equal illegality.

Technology, with respect to legal scrutiny, also has significant effects in terms of post-incident monitoring and assessment, two of the core components of legal scrutiny. These effects operate on several different levels. First, technology—from mobile phones with digital video recording capabilities to the ubiquity of access to the Internet in operational zones, and the availability of information and ease of information sharing across the Internet—clearly makes legal scrutiny of operations

significantly faster, more omnidirectional and more informed than at any time in the past. Footage of an incident recorded by a bystander on a mobile phone can be uploaded to the Internet within minutes and can be viral within minutes after that. Within hours, footage of an incident can be the subject of both informed and ill-informed legal scrutiny, the latter necessitating a response. Of course, more “informed” in terms of raw material forming the basis of assessment does not necessarily mean more “informed” in terms of analysis; that is a function of the law and the analytical process applied.

Access to information and comment, and the ability to in turn make further comment—regardless of its accuracy, quality, purpose or contextual worth—immediately available to millions of people can drive a scrutiny agenda down a myriad of paths, thereby opening the potential for irrelevant or minimally relevant factors or concerns to dominate or derail a debate or scrutiny project. Military and governmental public affairs bureaucracies are slower and less agile than many of the other actors in the ideas and influence marketplace, a logical consequence of both clearance requirements and the predilection for prior clarification and corroboration. The consequence, however, is that while operational public affairs mechanisms are generally proactive with respect to “good” news (or rather, are often the first and only media to report such stories), they are generally seen as merely responsive to “bad” news.

An example of how media-driven legal scrutiny can herd such scrutiny down situationally inconsequential or irrelevant paths might be illustrated by some media reporting of the Australian Director of Military Prosecution’s decision to prefer charges against three Australian soldiers in relation to a civilian casualty incident in Afghanistan. One issue that came to dominate the debate (for a period of time at any rate) was International Criminal Court (ICC) cognizance of, and jurisdiction over, the matter. While it was clear in press reporting that the charges were laid in accordance with Australian domestic law and after a Service Police investigation, an “*obiter*” comment by a respected Australian international law academic that merely reiterated that Australia has certain obligations under the Rome Statute⁹ suddenly saw the non-existent issue of overt ICC “pressure” become the focus of media-based legal scrutiny and reportage for a week. “International obligations may be compelling the prosecution of Aussie troops,” asserted one newspaper.¹⁰ However, it was clear—even on the facts as reported by the media—that the matter would be inadmissible before the ICC because Australia had appropriately investigated. Quasi-legal opinion that the decision to prosecute may have been taken to ensure the ICC could not intervene was not only ill-informed and irrelevant; it was manifestly wrong at law. In accordance with its own statute, the ICC’s attention, if any, is assuaged, regardless of any subsequent decision as to prosecution, at the point the

relevant State has properly conducted and considered an investigation, as Australia had done in this instance.

It was also clear, quite apart from the issue of complementarity, that the “gravity” requirement for enlivening ICC jurisdiction was not met in this case.¹¹ This, however, did not stop the public media-led legal scrutiny of the matter from proceeding down a deep and irrelevant rabbit hole, with resultant public misunderstandings of the role and jurisdiction of the ICC as a potentially enduring consequence.

Second, as noted previously, technology and the agility of non-State monitors and scrutinizers (who, as also noted previously, are often significantly more agile, flexible and quicker off the mark than more bureaucratic public affairs mechanisms) often combine to ensure that incidents are placed within the public domain in very short order. The consequence is that operational bureaucracies are increasingly forced to publicly respond well in advance of having collated and analyzed the available information. Whereas additional and alternative scrutiny was previously something that generally occurred after the reporting, investigation, assessment and results implementation process had been completed and communicated, the additional and alternative scrutiny process is increasingly multistaged: scrutiny based upon initial reports, scrutiny at the investigative stage, scrutiny at the assessment phase, scrutiny at the consequences stage (e.g., trials) and scrutiny at the implementation of the lessons-learned stage.

A recent example is apparent in one of the many threads of scrutiny activity that arose out of the October 2010 WikiLeaks disclosure of many thousands of classified documents relating to the Afghanistan conflict that had been prepared between January 2004 and December 2009. One public interest legal group wrote the UK Minister of Defence recommending investigation “as suspected war crimes” of incidents disclosed in the WikiLeaks documents. These documents disclose, the group asserts, the need for further legal scrutiny of “the killing of at least 26 civilians and the wounding of a further 20 by British forces.”¹² Legal scrutiny is thus now occurring, divisibly and in detail, at every procedural stage of an incident’s legal life—from initial reporting, to investigation, to judicial consideration, to outcomes and consequence implementation. Again, this is not an evolution to be decried; it carries with it great potential for increased transparency and accountability. But it also carries with it the potential for misinformation, inaccurate assessments and misguided responses at multiple fracture points in an incident’s legal journey, each of these inevitably coloring, shaping and informing the next sub-stage of scrutiny. This is a very different proposition from public reportage and opinion based on the invariably more considered and reflective legal scrutiny and

analysis that can accompany an open judicial hearing in which evidence is thoroughly tested, contextualized and weighed as it is being publicly disclosed.

Enablers: Capacities of Accountability Agents

The third element of the troika of enablers that are playing a significant role in the evolution of public legal scrutiny of operations is that some non-State accountability agents have become much more professional—and thus effective—in their approach to incidents, and much better equipped to conduct additional and alternative investigations. Academics and public interest law groups with a focus on litigation have long brought their analytical skills to bear on specific incidents but have traditionally been hamstrung by the availability of detailed information. But, as has been discussed, as information scarcity becomes less the norm, the opportunities for such academics and public interest law groups to engage with specific incidents in much greater detail and with significantly greater fidelity has grown apace.¹³

Similarly, the general stock-in-trade of many NGOs was for many years limited by information and capacity to general comments or press statements. Today, however, the increased and improved professionalism, access, resourcing and specialization of some NGOs have enabled them to become highly influential non-State actors in the field of legal scrutiny of operational incidents.¹⁴ Second-order issues such as scrutiny on reputation, and creating impetus for policy change as a means of achieving effects on operations—effects that can be achieved on the basis of reportage and opinion as opposed to detailed legal investigation and analysis—are no longer necessarily the focus of some better resourced, connected and informed NGOs. These accountability agents are now focusing more extensively upon achieving direct and discernible results in terms of legal processes and consequences by inquiring into issues with much greater granularity and utilizing more rigidly (if not always accurately or correctly) applied legal frameworks as the paradigms within which they inquire, analyze and conclude. This allows these accountability agents to create opportunities for more direct and timely change. Being told that your policy is wrong is a less legally significant issue—and is likely to prompt a less immediate result—than being told that you are in breach of the law.

Consequences?

Although the enablers outlined above are but three of many that are driving the changing nature of legal scrutiny of operations, they do point the way to three thematic conclusions as to the future shape of this evolution. The first, which is no

surprise, is that the language of additional and alternative scrutiny of operational incidents will continue to be dominated by law and legal paradigms. Engaging with and analyzing the high volume of disparate and hybrid pieces of information that are increasingly available to alternative accountability agents, such as NGOs, the media and academics, are difficult in the absence of an organizing principle and framework. Perhaps much more readily than purely policy analysis, law provides a universally recognized (if not always universally agreed upon) framework, supplemented by detailed rules and processes, against which that information can be marshaled and applied. Further, legally based scrutiny projects bring with them the potential for substantially more urgent and direct responses and consequences than many forms of policy pressure exerted with respect to the same issue. Being told, in detail, how and why your use of force breaches the law is much more likely to prompt an immediate response than being told why your approach to the use of force is wrong from a policy perspective.

Second, military operations are ever-increasingly intelligence led and effects based. The natural consequence is that militaries not only have the capacity to generate greater levels of information on discrete targets or on discrete operational incidents, but are in fact driven by law, strategy and doctrine to do so. This development clearly opens discrete incidents to deeper additional or alternative scrutiny because each incident is treated more rigorously as an individual circumstance, thereby generating greater levels of detail and thus greater opportunities for detailed legal scrutiny. It also opens the path for new levels of legal scrutiny into ever more narrowly defined issues such as the reliance a commander placed upon individual pieces of information. It will become increasingly possible—at the very least through the cross-referencing capabilities of Internet searching—for scrutinizers to arm themselves with information that will allow them to engage not just with the law as it relates to a particular piece of intelligence that a commander may have relied upon, but with the law that relates to the manner by which it was collected, the process by which it was analyzed and the source from whence it was drawn. This is already the case with the markedly increased potential for additional and alternative legal scrutinizers to analyze particular weapons-use incidents.

It is also becoming an accepted fact of operational life that such legal scrutiny of intelligence itself is now routinely possible on the basis of publicly available information: scrutiny as to the motives and background of individual sources of intelligence (warlord, sympathizer or user of the military force as a proxy in his/her own vendettas?); as to the legal status of the process by which that intelligence was collected (telecommunications intercepts, biometrics, paid human agents?); and the availability of other information that enhances or degrades the quality of that intelligence. It is also entirely possible that post-incident scrutinizers are able to easily

find and apply—and thus assume a commander's knowledge of—additional information to which that commander may not have actually had access.

The third consequence of this evolution in the legal scrutiny of operations is that it is no longer just about what is investigated; it is about who investigates, when and where they investigate, how they investigate, that body of law used to investigate, and that body of law (or which States' particular interpretation of the law) used to measure the results. That is, the dimensions of additional and alternative legal scrutiny have now spread well beyond simple engagement with the incident itself. It is a statement of the obvious that additional and alternative legal scrutiny projects will continue to broaden in focus so as to engage with any ancillary or related issue where there is a legal framework that is readily applicable and information that is readily available.

Conclusion

The changing nature of legal scrutiny of operations generally, and of operational incidents more particularly, is not to be decried. It is vital that militaries and States acknowledge and accept that this is ultimately a positive development in the evolution of transparency and accountability in operations. It is also important that militaries and States understand that this evolution will continue regardless. However, the obligations created by this evolution are not all one way. Certainly States will continue to test and adjust their processes in order to respond to this development by developing quicker public affairs mechanisms, through increasing transparency in releasing their own investigation or inquiry findings in relation to certain incidents, and by engaging in detailed rebuttals of additional and alternative legal scrutiny reports where appropriate. But this development also places obligations upon these additional and alternative legal scrutiny agents in terms of their own engagement with information, analysis and the law. With power comes responsibility, and legal scrutiny is nothing if not powerful.

Notes

1. See also, e.g., the series of articles by Ryan Goodman & Derek Jinks, Ken Watkin, Mike Schmitt, Bill Boothby, W. Hays Parks and Nils Melzer in Forum, *The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, 42 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 637 (2010).

2. Staff Sergeant Bruce Cobbledick, *Artillerymen in Afghanistan use innovation to reduce collateral damage*, CENTCOM.MIL, <http://www.centcom.mil/en/news/artillerymen-in-afghanistan-use-innovation-to-reduce-collateral-damage> (last visited Nov. 2, 2010).

3. *Id.*

4. For example, with respect to civil society, see *AUTHORS TAKE SIDES: IRAQ AND THE GULF WAR* (Jean Moorcroft Wilson & Cecil Woolf eds., 2004); with respect to political debate, see Australia, House of Representatives Debate, HANSARD, Mar. 18, 2003, at 12505 (statement of Prime Minister Howard) (transcript available at <http://www.aph.gov.au/hansard/rep/dailys/dr180303.pdf>); with respect to media reportage and opinion, see Don Anton et al., *Opinion, Coalition of the willing? Make that war criminals*, SYDNEY MORNING HERALD, Feb. 26, 2003, News and Features, at 15 (an opinion piece signed by forty-two noted scholars and intellectuals), available at <http://law.anu.edu.au/cipl/Newsletters/03%20April%20newsletter.pdf>.

5. Sean Rayment, *Sniper sues Army over error which put him in danger of being kidnapped by al-Qaeda*, DAILY TELEGRAPH (London) (July 31, 2010), <http://www.telegraph.co.uk/news/worldnews/asia/afghanistan/7920194/Sniper-sues-Army-over-error-which-put-him-in-danger-of-being-kidnapped-by-al-Qaeda.html>.

6. Richard Norton-Taylor, *UK accused over Taliban torture risk when handing over insurgents*, GUARDIAN (London), Apr. 20, 2010, at 14, available at <http://www.guardian.co.uk/world/2010/apr/19/torture-risk-taliban-british-accused>. See *The Queen (on the application of Maya Evans) v. Secretary of State for Defence* [2010] EWHC 1445 (Admin).

7. For a nuanced analysis of some of the relevant issues, see Michael Schmitt, *Precision Attack and International Humanitarian Law*, 87 INTERNATIONAL REVIEW OF THE RED CROSS 445, 449–50 (2005), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-859-p445/\\$File/irrc_859_Schmitt.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-859-p445/$File/irrc_859_Schmitt.pdf).

8. Letter from Brad Evans, Executive Director, Asia Division, Human Rights Watch, to Secretary of Defense Robert Gates (Jan. 15, 2009), <http://www.hrw.org/en/news/2009/01/14/letter-secretary-defense-robert-gates-us-airstrikes-azizabad-afghanistan> (emphasis added).

9. Dan Oakes, *Trial's role in winning over Afghans*, SYDNEY MORNING HERALD, Sept. 29, 2010, *The Nation*, at 6, available at <http://www.smh.com.au/world/trials-role-in-winning-over-afghans-20100928-15vtp.html>.

10. See, e.g., Chris Merritt & Nicola Berkovic, *Soldiers caught in justice divide*, THE AUSTRALIAN, Sept. 30, 2010, Features, at 13, available at <http://www.theaustralian.com.au/news/features/who-should-judge-our-warriors/story-e6frg6z6-1225931975906>.

11. See Statute of the International Criminal Court art. 17(1), July 17, 1998, 2187 U.N.T.S. 90 (“[T]he Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; . . . (d) The case is not of sufficient gravity to justify further action by the Court.”).

12. David Leigh & Ed Pilkington, *Rights campaigners try to force MoD to court over Afghan killings*, GUARDIAN (London), Aug. 2, 2010, at 4, available at <http://www.guardian.co.uk/uk/2010/aug/01/campaigners-mod-court-afghanistan/print>.

13. For example, prior to the 2003 Iraq conflict, public interest law groups were able to access sufficient general information to bring proceedings in the UK High Court in relation to the legality of any prospective decision to commence operations in Iraq. See *R (on the application of the Campaign for Nuclear Disarmament) v. Prime Minister and Others* [2002] EWHC 2777 (Admin). In 2009–2010, the significantly greater availability of information (including through disclosures such as the WikiLeaks tranches on Iraq and Afghanistan) has seen, as noted previously, public interest law groups furnished with sufficient detail and specificity regarding discrete operational incidents to support litigation and judicial review of individual detainee transfer and civilian casualty incidents.

14. Amnesty International and Human Rights Watch are but two examples. See, e.g., the sophistication and engagement with detail evident in Human Rights Watch, *Killings in Eastern Rwanda* (Jan. 2007), <http://www.hrw.org/en/reports/2007/01/22/killings-eastern-rwanda>. See also Human Rights Watch, *Afghanistan: US Should Act to End Bombing Tragedies* (May 14, 2009), <http://www.hrw.org/en/news/2009/05/14/afghanistan-us-should-act-end-bombing-tragedies>. With respect to the latter report in particular, I must, however, note that while I certainly respect the endeavor, I do not necessarily agree with the outcomes.

XVI

Litigating How We Fight

Ashley S. Deeks*

I. Introduction

It is well-documented that the way the Bush administration chose to conduct its conflict against al Qaeda caused a significant rift between the United States and European States. US policies that authorized the use of renditions, secret detention facilities and harsh interrogation techniques created diplomatic tension between the United States and many of its European allies, making it harder to focus on other bilateral and multilateral issues and at times diminishing law enforcement and intelligence cooperation.¹ Many of these European reactions and decisions were discretionary, taken by the political branches of European countries in response to pressure from their electorates and human rights groups. One might reasonably think, therefore, that some of the changes introduced by the Obama administration related to the conflict with al Qaeda—the three January 2009 executive orders, for instance—would have started to close that rift.²

But something remarkable—and surprisingly unremarked upon—has been happening since 2001 that is both widening and securing the permanence of this transatlantic divide. Courts on both sides of the Atlantic are deciding cases brought by individuals who are contesting the way States have been fighting armed conflicts with non-State actors (such as the Taliban and al Qaeda, as well as

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armed groups in Iraq). With the exception of individual claims related to the lawfulness of detention at Guantanamo, the US government has won the vast majority of its cases, with the courts often declining even to reach the merits of the claim.³ In contrast, European States (with the United Kingdom leading the way) have lost virtually every case on these issues that has come before their courts or before the European Court of Human Rights (ECtHR). These cases are having a systematic effect on States' decisions about how to conduct themselves in armed conflict. It therefore is in the interests of policymakers and warfighters to understand this trend.

Part II of this article examines the wide spectrum of cases in which States or State officials have been sued for their alleged conduct related to non-international armed conflicts. Part III assesses the real-world implications for the judicial decisions in each area, not only for the specific litigants but also for government policy and operations more generally. Part IV considers possible explanations for the divergent outcomes of these cases and offers some thoughts about how States might try to manage these developments in the future.

II. Suing States over How They Fight

Virtually every aspect of the way in which the United States and European States are fighting conflicts against non-State actors—including detention, the use of force during occupation, the transfer of detainees from one State to another and the use of intelligence and intelligence agencies—has been challenged in court.⁴ These cases stem primarily from the conflicts in Iraq and Afghanistan, though some flow from the US conflict with al Qaeda outside of those theaters and allegations about US activities, such as renditions, in the course of that latter conflict. This Part examines four categories of claims asserting unlawful actions by States: unlawful detention, unlawful treatment, unlawful transfers and illegality in intelligence activities. Each section focuses first on US cases and then turns to other States' cases, most often cases brought in the United Kingdom.

Claims of Unlawful Detention

US Cases

It is useful to sort into three general categories claims brought by detainees against the United States alleging that they are being unlawfully detained. First, detainees have challenged the executive branch's general authority to detain al Qaeda and Taliban fighters under the laws of war. US courts have upheld the executive's authority in this area. In *Hamdi v. Rumsfeld*, the Supreme Court upheld the legality of

detention of individuals engaged in hostilities against the United States in Afghanistan, while requiring the US government to provide the individual detainee in question with a process by which to contest the factual basis for his detention.⁵ Likewise, in *Hamdan v. Rumsfeld*, the Supreme Court affirmed that the United States was in an armed conflict with al Qaeda and did not question the legality of Hamdan's detention as a member of al Qaeda (though it concluded that the military commission before which the United States planned to try him was unlawful).⁶

Second, detainees have sought to have federal courts, not just the executive branch, review the legality of their detentions. The United States, which has argued against the extension of review to courts, has lost these cases. The chain of cases that resulted in the Supreme Court's holding that constitutional habeas corpus applies to detainees held at Guantanamo includes *Rasul v. Bush* and *Boumediene v. Bush*.⁷

The *Boumediene* decision resulted in a third category of cases: detainees at Guantanamo have brought habeas petitions challenging the specific factual bases for their detentions. The United States is defending almost two hundred habeas cases brought by those who remain at Guantanamo, and has lost a number of cases, even as the courts continue to uphold the basic scope of the government's claimed detention authority.⁸ Much ink has been spilled about the unprecedented nature of judicial review of the propriety of a person's detention during an armed conflict. Indeed, the fact that the federal district courts hearing these cases are struggling with what rules to apply to this review illustrates the novel nature of the courts' role in this type of decision making and the non-traditional nature of the armed conflict.⁹ The outcomes of these cases have been mixed: the courts (to date) have denied detainees the writ of habeas in about sixteen cases, and have granted it in thirty-seven cases.¹⁰ As a result, the United States has transferred a number of detainees to their countries of nationality or other locations, and in other cases continues to seek homes for those ordered released.

In *Boumediene*, the Supreme Court evaluated three factors to determine the reach of the writ of habeas in the wartime detention context: "(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ."¹¹

One question left unresolved by *Boumediene* was whether the right of habeas corpus might extend to detainees held in US custody in locations other than Guantanamo.

In May 2010, the D.C. Circuit answered this question in the negative in the *Maqaleh* case, at least with regard to certain detentions in Afghanistan.¹² The court

applied the three *Boumediene* factors to determine whether the writ would run to the detention in Afghanistan by the United States of three non-Afghan detainees who alleged that the United States apprehended them outside of Afghanistan. The *Maqaleh* court concluded that the writ did not run to those detainees, holding that “under both *Eisentrager* and *Boumediene*, the writ does not extend to the Bagram confinement in an active theater of war in a territory under neither the *de facto* nor *de jure* sovereignty of the United States and within the territory of another *de jure* sovereign.”¹³ In reaching this conclusion, the court expressed concern about an interpretation of the Suspension Clause that would “create the potential for the extraterritorial extension of the Suspension Clause to noncitizens held in any United States military facility in the world, and perhaps to an undeterminable number of other United States–leased facilities as well.”¹⁴ The court thus determined that it lacked jurisdiction to hear the detainees’ claims.¹⁵ This holding—in a case in which the detainees were not Afghan nationals and in which they alleged that they were not apprehended in Afghanistan—suggests that it is even more unlikely that US courts would conclude that habeas would extend to detainees such as Afghan nationals apprehended in Afghanistan during the current conflict.

While it is possible to imagine a future US detention facility that falls between Guantanamo and Bagram Air Base in Afghanistan on the spectrum of the *Boumediene* factors, for now it appears as though Guantanamo detainees are *sui generis* in being alien wartime detainees entitled to federal court review of their detentions. Courts thus have left it to the executive branch to determine whether, outside of Guantanamo, a particular individual’s detention during armed conflict is lawful.

UK Cases

The UK case of *al-Jedda*, another case about the legality of a detention during non-international armed conflict, stands in some contrast to *Maqaleh*.¹⁶ The ECtHR held a merits hearing on June 9, 2010, so its ultimate disposition remains uncertain. However, the UK House of Lords decision is worth considering both for its holding and because it illustrates the complicated expansion of the European Convention on Human Rights (ECHR)¹⁷ into warfighting for States parties to that Convention. The larger implications for that expansion are discussed in Part III.

The UK armed forces in Iraq detained Mr. al-Jedda, a dual British-Iraqi national, for several years as a “security internee.” Al-Jedda challenged his detention, claiming it violated ECHR Article 5, which defines the situations in which a State lawfully can deprive a person of his liberty, and which does not include security detention.¹⁸ The UK government pursued two main lines of argument. First, it argued that al-Jedda’s detention was attributable not to the United Kingdom but to

the UN, which had authorized a multinational force to take action in Iraq. Second, it argued that his detention was authorized by UN Security Council Resolution 1546 (UNSCR 1546), which contemplated detention “for imperative reasons of security,”¹⁹ and that the Resolution therefore qualified al-Jedda’s rights under ECHR Article 5 (and under the UK’s Human Rights Act (HRA), which implemented the ECHR in UK law).

The House of Lords rejected the UK’s first argument but accepted—in part—its second. The Law Lords determined that Article 103 of the UN Charter, which provides that a State’s obligations under the Charter prevail over any other of the State’s international obligations, qualified the UK’s obligations under ECHR Article 5.²⁰ However, the Lords made clear that UNSCR 1546 did not supplant Article 5 entirely. One lord’s opinion stated, “[T]he UK may lawfully, where it is necessary for imperative reasons of security, exercise the power to detain authorised by UNSCR 1546 and successive resolutions, but must ensure that the detainee’s rights under article 5 are not infringed to any greater extent than is inherent in such detention.”²¹ Another lord noted that the scope of UNSCR 1546 and the way the Resolution might interact with Article 5’s requirements were not clear and that the issue would remain for decision in future proceedings.²² Three of the five Lords expressed discomfort with security detention generally; one suggested that the United Kingdom bring al-Jedda back to the United Kingdom and another favored criminal proceedings, viewing security detention only as a fallback. (Both of these positions are in tension with the view under the law of war that security detention in the location in which the conflict is occurring is acceptable.)

The House of Lords thus considered that it had jurisdiction to review al-Jedda’s claims, in contrast to the D.C. Circuit in *Maqaleh*. Further, while it upheld al-Jedda’s detention as lawful, it held that UNSCR 1546 qualifies the applicability of ECHR Article 5, but only to the extent necessary to give effect to the obligations in UNSCR 1546. In other words, Article 5 continues to apply to the UK’s security detentions to the greatest extent possible consistent with the Resolution. It remains to be seen whether the ECtHR will take a similar or more expansive view of the extent to which the UK’s obligations under the ECHR must govern its treatment of its detainees during armed conflicts outside UK territory.²³

Claims of Unlawful Detainee Treatment

Another category of claims against States fighting non-international armed conflicts is claims that detainees in these States’ custody suffered mistreatment at the hands of State officials, either directly or as a result of policies approved by the officials.

US Cases

Individuals detained as suspected members of al Qaeda or the Taliban have brought a number of cases in US courts seeking declaratory relief and damages for their alleged abuse while in US custody. Some have tried to sue US government officials, while others have tried to sue US contractors.²⁴ None has succeeded to date; further, the courts have resolved the cases in a way that has avoided addressing the underlying substantive claims.

In *Rasul v. Rumsfeld*, four former Guantanamo detainees sued former Secretary of Defense Donald Rumsfeld and ten other senior military officials, seeking damages for their detention and alleged mistreatment while in that facility.²⁵ They claimed that they were subjected to beatings, sleep deprivation, extreme temperatures, forced nudity, death threats and interrogations at gunpoint. Their claims alleged violations of the US Constitution and international law, including the 1949 Geneva Conventions. In 2008, the D.C. Circuit dismissed the case; the Supreme Court granted certiorari, vacated and remanded for further consideration in light of *Boumediene*.²⁶ On remand, the D.C. Circuit again dismissed the case, holding that the defendants were entitled to qualified immunity.²⁷ In addition to holding that “[n]o reasonable government official would have been on notice that plaintiffs had any Fifth Amendment or Eighth Amendment rights,” the court also expressed its view that “the Court in *Boumediene* disclaimed any intention to disturb existing law governing the extraterritorial reach of any constitutional provisions, other than the Suspension Clause.”²⁸ The Supreme Court denied certiorari in 2009.

Likewise, in *Arar v. Ashcroft*, Maher Arar sued the former Attorney General and other US officials, claiming that they had violated the Torture Victims Protection Act and Arar’s Fifth Amendment rights by authorizing his removal to Syria without appropriate process and with the knowledge that the Syrian government would detain and torture him.²⁹ The Second Circuit, sitting *en banc*, declined to create a new *Bivens* damages remedy against the government officials allegedly responsible for his transfer. The Second Circuit described the diplomatic, foreign policy, classified information and national security implications of allowing damage claims for harms suffered during renditions as among the “special factors” counseling against the extension of a *Bivens* action to this type of activity.³⁰ The court concluded,

[W]e decline to create, on our own, a new cause of action against officers and employees of the federal government. Rather, we conclude that, when a case presents the intractable “special factors” apparent here, . . . it is for the Executive in the first instance to decide how to implement extraordinary rendition, and for the elected members of Congress—and not for us as judges—to decide whether an individual may seek compensation from government officers and employees directly, or from the government, for a constitutional violation.³¹

The court thus deferred to the political branches in assessing whether and how to create such a remedy.

In this context, it is worth mentioning *Hamdan v. Rumsfeld*. While that case was about the legality of the military commissions created to try Mr. Hamdan, and not about his treatment in detention, the Supreme Court's decision that Common Article 3 of the Geneva Conventions applied to the US conflict with al Qaeda had a direct effect on the rules governing the US government's treatment and interrogation of al Qaeda (and Taliban) detainees. One might therefore view this case as an example that runs counter to the primary thesis of this article, because a US court waded into an issue that forced it to examine what rules the executive branch must apply to military operations during an armed conflict. However, it is possible to view the case as one whose core issues were squarely of the type that courts usually adjudicate: the interpretation of two US statutes (the Uniform Code of Military Justice and the Detainee Treatment Act) and the parameters of a fair trial, with the holding's implications for broader treatment issues an important second-order effect. Indeed, even though the US government asked the courts to abstain from considering the merits of the case, its primary argument was that the courts should abstain until the military justice process ran its course, not that the issue was a political question inappropriate for judicial review.³²

UK Cases

In contrast, the UK courts allowed a comparable case of alleged detainee abuse in Iraq by UK forces to proceed, with Her Majesty's Government (HMG) conceding that the ECHR applied to an Iraqi detainee who had been killed while in its custody. In *al-Skeini v. Secretary of State for Defence*, family members of six Iraqi civilians killed in Iraq brought cases against HMG.³³ In each case, a member of the UK armed forces had killed the individual at a time when the United Kingdom was an occupying power in Basra, Iraq. Five of the individuals were killed during UK patrols or raids on houses; the sixth, Baha Mousa, was detained and beaten to death in UK custody. The Iraqis' claims were based on the UK's HRA, a law that requires those bringing cases under the law to show that the UK government acted in a manner incompatible with an ECHR right of the claimant or deceased.³⁴ The individuals claimed that the UK's actions violated its procedural obligations under Articles 2 (right to life) and 3 (right not to be subjected to torture) of the ECHR (and the corresponding parts of the HRA) to investigate violations thereof.³⁵

The UK government argued that the HRA did not apply to UK government actions outside its borders.³⁶ With regard to Mr. Mousa, however, the UK government conceded that, while he was in UK detention, Mr. Mousa was within its jurisdiction for purposes of applicability of the ECHR.³⁷ Because the United Kingdom

conceded this, the *al-Skeini* court did not discuss the issue in any depth. Several scholars have noted the uncertainty as to the precise basis for the House of Lords' holding regarding Mousa; it "was apparently premised on some special jurisdiction that the United Kingdom was said to have over its military prisons abroad, not on the fact of direct physical control over Mr Baha Mousa."³⁸ In any event, this concession by the UK government suggests that the United Kingdom will treat future overseas detentions during armed conflict or peacekeeping operations as being covered by the ECHR unless there is a specific UN Security Council resolution in place that would "trump" the UK's ECHR obligations.³⁹ As with *al-Jedda*, the ECtHR is hearing the *al-Skeini* case, so the case's ultimate outcome remains unresolved.

Claims of Unlawful Detainee Transfers

In another series of suits filed in regard to conduct taking place during non-international armed conflicts, detainees have asked courts to enjoin their transfers from the custody of the State holding them to the custody of another State. Detainees who had been in US (and Canadian) custody have lost their cases; based upon the approach of the UK courts and the ECtHR to date, the detainees who are or were in UK custody seem likely to win theirs.

US Cases

In 2006, two US nationals held by Multi-National Forces–Iraq (MNF-I) filed petitions for habeas corpus in US court, asking the court to block their transfer by MNF-I to Iraqi officials (who had issued arrest warrants for them).⁴⁰ The Supreme Court, hearing their consolidated cases as *Munaf v. Geren*, considered "whether United States district courts may exercise their habeas jurisdiction to enjoin our Armed Forces from transferring individuals detained within another sovereign's territory to that sovereign's government for criminal prosecution."⁴¹ The Court concluded that, although US courts had statutory habeas jurisdiction over the individuals (presumably because they were US citizens), those courts could not grant the remedy sought.⁴²

Although not the sole basis for its holding, the Court took into account the fact that the individuals were captured in the context of an ongoing conflict. The Court considered other cases in which the United States had transferred US citizens to foreign countries for trial and remarked:

Neither *Neely* nor *Wilson* concerned individuals captured and detained within an ally's territory during ongoing hostilities involving our troops. *Neely* involved a charge of embezzlement; *Wilson* the peacetime actions of a serviceman. Yet in those cases we held

that the Constitution allows the Executive to transfer American citizens to foreign authorities for criminal prosecution. It would be passing strange to hold that the Executive lacks that same authority where, as here, the detainees were captured by our Armed Forces for engaging in serious hostile acts against an ally in what the Government refers to as “an active theater of combat.” . . . Such a conclusion would implicate not only concerns about interfering with a sovereign’s recognized prerogative to apply its criminal law to those alleged to have committed crimes within its borders, but also concerns about unwarranted judicial intrusion into the Executive’s ability to conduct military operations abroad.⁴³

Thus, the Court concluded that it could not enjoin US armed forces from transferring individuals detained within Iraq’s territory to the Iraqi government for criminal prosecution.

Guantanamo detainees have been no more successful in suing to block their transfers to other countries. In a case known as “*Kiyemba II*,” the D.C. Circuit held that *Munaf* controlled to bar courts from granting writs of habeas corpus to block transfers of detainees from the United States to foreign countries, even when those being transferred would face continued detention or prosecution under the receiving country’s laws.⁴⁴ The Supreme Court denied certiorari in 2010.⁴⁵ Federal judges thus lack the authority to block, even temporarily, the transfer of a detainee from Guantanamo to another country. This allows the US government to decide without judicial interference where and when to send detainees, as long as the United States acts consistently with its own policy not to transfer a detainee to a place where he is more likely than not to face torture.⁴⁶ US courts thus remain wary in this context of conducting inquiries into the legal process or treatment that an individual will face upon transfer, while leaving open the possibility that they would do so if it were manifest that the individual would be tortured if transferred.

Canadian Case

On facts similar to *Munaf*, Canada’s courts took a similarly skeptical view about the propriety of blocking transfers from a detaining State to a territorial State, at least where an agreed treatment framework was in place. In 2007, Amnesty International sued Canada to prevent Canadian troops in Afghanistan from transferring detainees to the Islamic Republic of Afghanistan (IRoA). It was claimed that IRoA mistreats detainees, which means that such transfers violated Canada’s constitution. A Canadian federal judge concluded in 2008 that Afghan detainees were not entitled to protection under the Canadian Charter and dismissed Amnesty International’s claim.⁴⁷ The Canadian Court of Appeal affirmed, concluding that the Canadian forces lacked “effective control” over Afghan territory; that the Canadian Charter therefore should not apply to that territory; that IRoA had not consented

to the application of the Canadian Charter over Afghan nationals; and that instead the Canadian government and IROA expressly identified international law as the law governing treatment of detainees in Canadian custody.⁴⁸

UK Cases

The ECtHR has been far less deferential to the laws and prerogatives of foreign sovereigns and to the diplomatic judgments of the ministries of States parties, including—but not limited to—situations in which a State seeks to transfer to another country a detainee picked up in a non-international armed conflict.

Al-Saadoon v. United Kingdom offers a current example.⁴⁹ Although the UK government won the case in its domestic courts, the case came out the opposite way from *Munaf*, on similar facts, in the ECtHR.⁵⁰ The UK courts deemed it lawful for the United Kingdom to transfer to Iraqi authorities for trial two Iraqi murder suspects.⁵¹ The individuals faced the death penalty under Iraqi law and sued to block their transfer from UK custody, claiming that it would violate the ECHR prohibitions against the death penalty and cruel, inhuman and degrading treatment. The UK Court of Appeal concluded that the individuals were not within the UK's jurisdiction for purposes of the application of the ECHR, considering an international arrangement between the United Kingdom and the government of Iraq regarding the allocation of legal and physical custody of detainees.⁵²

The individuals appealed to the ECtHR, which held that the transfer breached the ECHR.⁵³ The Court first concluded (in its opinion on the admissibility of the case) that the applicants were within the jurisdiction of the ECHR.⁵⁴ On the merits, the Court held that the death penalty could be considered inhuman and degrading and contrary to Article 3 of the Convention and that there were substantial grounds for believing that there was a real risk of the applicants' being sentenced to death and executed.⁵⁵ (The United Kingdom had not sought death penalty assurances from Iraq.) Although HMG argued that it had no option but to respect Iraqi sovereignty and transfer the applicants who were Iraqi nationals held on Iraqi territory to the custody of the Iraqi courts when so requested, the Court was not satisfied that the United Kingdom had done all it could have to secure the applicants' rights under the Convention, including by trying to negotiate death penalty assurances with the Iraqi government.⁵⁶ In contrast to the US Supreme Court's deference to the Iraqi legal system and Iraq's decision to prosecute someone alleged to have broken Iraqi law, the ECtHR stated, "There was no obligation under either Iraqi domestic law or international law which required either for the applicants' cases to be referred to the Iraqi criminal courts or for them to be reclassified as criminal detainees."⁵⁷ The Court concluded unanimously that there had been a violation of Article 3 of the Convention over the UK's objections that "a

finding that a Contracting State was under an obligation to secure the Convention rights and freedoms when acting territorially and outside the regional space of the Convention gave rise to real conceptual, practical and legal difficulties.”⁵⁸

The Court’s ruling makes clear that a European country cannot transfer a person in its custody to another government’s custody where there are substantial grounds for believing there is a real risk of the person’s being subjected to ill-treatment, even during an armed conflict and even where the transferring government is holding the individual in another State’s territory and seeking to transfer the individual to the custody of the territorial State. It is particularly notable that the ECtHR concluded that the transfer was unlawful even where the detainees at issue were Iraqi nationals (rather than the nationality of the forces holding them, that is, British). Further, the ECtHR ordered the UK government to undertake particular diplomatic steps, despite the UK government’s unambiguous assessment that doing so would have an adverse diplomatic effect. Thus, unlike the courts in *Munaf* and *Kiyemba II*, the ECtHR concluded that it had jurisdiction to hear the underlying allegations and reached a decision on the substance of those allegations.

Finally, in a case involving the conflict in Afghanistan, the United Kingdom faced a suit by former UK detainees in Afghanistan challenging a UK policy permitting transfers of detainees to the Afghan National Directorate of Security (NDS).⁵⁹ The detainees claimed that they were subjected to torture after they were transferred, and that their transfers therefore violated ECHR Article 3.⁶⁰ The UK court concluded that HMG could continue to transfer detainees to two NDS facilities if it met a number of conditions, but could not transfer detainees to a third NDS facility.⁶¹ Again, in contrast to the decisions of US courts in *Munaf* and *Kiyemba II*, the UK court concluded that it had jurisdiction to hear the underlying allegations and reached a decision on the merits based on an in-depth probe of those allegations. Although the UK court concluded that at least some UK transfers could continue and was more deferential to diplomatic judgments by HMG than the ECtHR, it seems likely that the claimants will appeal the decision first within the UK court system and subsequently to the ECtHR (if they continue to lose in UK courts).

Claims about Illegality in Intelligence Activities

Yet another category of litigation has raised hard questions for courts: litigation in which the heart of the case implicates classified intelligence information or relates to the activities of intelligence agencies. At times, this means that the litigation may implicate intelligence relationships between States, which are by definition highly sensitive. Of particular interest in this category of litigation is the direct interplay between several UK and US cases.

US Cases

Two recent cases in US courts bear mention: *el-Masri v. United States* and *Mohamed v. Jeppesen Dataplan*.⁶² The US executive branch invoked the “state secrets” privilege as a way to avoid litigating both cases. When the US government invokes that privilege, the head of the agency whose activities are at issue files an affidavit stating that the litigation, if allowed to proceed, might disclose information that could endanger national security.

In *el-Masri*, the plaintiff sued the former director of the Central Intelligence Agency (CIA), three aviation companies and unnamed intelligence agents, alleging that the CIA detained him in Macedonia and flew him to a detention facility in Afghanistan where he was abused, before the CIA realized it had detained the wrong person and released him. El-Masri claimed this violated the US Constitution and international norms prohibiting arbitrary detention and cruel, inhuman and degrading treatment.⁶³

The Fourth Circuit dismissed the case, concluding that even though US government officials had discussed the rendition program publicly at a high level of generality, secret information formed “the very subject matter” of the program. Specifically, the court noted that the state secrets privilege attaches and may bar the entire proceedings where “there is a reasonable danger that [the information’s] disclosure will expose military (or diplomatic or intelligence) matters which, in the interest of national security, should not be divulged” and where “the circumstances make clear that privileged information will be so central to the litigation that any attempt to proceed will threaten that information’s disclosure.”⁶⁴ The court concluded:

[W]e must reject El-Masri’s view that the existence of public reports concerning his alleged rendition (and the CIA’s rendition program in general) should have saved his Complaint from dismissal. Even if we assume, *arguendo*, that the state secrets privilege does not apply to the information that media outlets have published concerning those topics, dismissal of his Complaint would nonetheless be proper because the public information does not include the facts that are central to litigating his action. Rather, those central facts—the CIA means and methods that form the subject matter of El-Masri’s claim—remain state secrets.⁶⁵

The Supreme Court denied a writ of certiorari in 2008.

In *Jeppesen*, the Ninth Circuit, in a closely decided *en banc* opinion, took the same approach to the privilege. Five foreign nationals sued a subsidiary of Boeing, claiming that the subsidiary provided planes, flight planning and logistical support to the CIA to render individuals to “black sites,” knowing that they would be mistreated by US and foreign officials. The United States intervened, invoking the state

secrets privilege and arguing that the court must dismiss the entire action. An affidavit by former CIA Director Hayden stated, “Disclosure of the information covered by this privilege assertion reasonably could be expected to cause serious—and in some instances, exceptionally grave—damage to the national security of the United States and, therefore, the information should be excluded from any use in this case.”⁶⁶ The US government and the defendants relied on precedent holding that “a suit predicated on the existence and content of a secret agreement between a plaintiff and the government must be dismissed on the pleadings because the ‘very subject matter’ of the suit is secret.”⁶⁷

A Ninth Circuit panel rejected that view, concluding that it was not appropriate to stop the lawsuit at its outset, but the Ninth Circuit, sitting *en banc*, held that the state secrets privilege required dismissal of the plaintiffs’ case.⁶⁸ In discussing its role in evaluating the claim of the privilege, the court struck a balance between deference to the executive branch and the need to provide some objective review of the invocation of the privilege. It stated,

In evaluating the need for secrecy, “we acknowledge the need to defer to the Executive on matters of foreign policy and national security and surely cannot legitimately find ourselves second guessing the Executive in this arena.” But “the state secrets doctrine does not represent a surrender of judicial control over access to the courts.” Rather, “to ensure that the state secrets privilege is asserted no more frequently and sweepingly than necessary, it is essential that the courts continue critically to examine instances of its invocation.”⁶⁹

Thus, in the face of highly controversial alleged US government activity, two circuit courts have taken a reasonably broad reading of the state secrets privilege, dismissing the cases at the pleading stage at the request of the US executive branch to avoid revealing in litigation sensitive evidence that would impact national security.

UK Cases

UK courts, by contrast, have been less sympathetic to the government’s interests in protecting intelligence information, a fact that seems likely to affect UK policies moving forward. This is illustrated by recent decisions in three cases: a case brought against the UK government by a UK resident, Binyam Mohamed, to obtain information about his alleged treatment by the United Kingdom and United States; cases brought by Mohamed and several other former Guantanamo detainees seeking damages from the UK government; and a case brought by Mohamed and others against Jeppesen UK.

The *Binyam Mohamed* litigation to obtain intelligence information was procedurally complex.⁷⁰ In 2008, Mohamed, then detained at Guantanamo and charged

in a military commission, sued the UK government to obtain any information it had received from the United States about his detention and interrogation. He claimed that he was detained in Pakistan, mistreated there, then moved by the United States to Morocco and Afghanistan, mistreated there, and ultimately sent to Guantanamo. He also claimed that the UK intelligence agencies knew where he was, provided to US intelligence officials questions to ask him, and received interview reports from the United States. Mohamed's stated goal of obtaining the information was to allow him fully to defend himself in the military commission.

Although the US government subsequently dropped the military charges against Mohamed and shared the relevant material in redacted form with Mohamed's habeas attorneys, a UK court ultimately ordered HMG to disclose certain secret information to his lawyers, and the press then sought to obtain that information. In 2009, the court concluded that the intelligence documents detailing Mohamed's treatment should not be published, based in part on "threats" by the United States to withhold from the United Kingdom future intelligence sharing. To that end, the court redacted seven paragraphs in its judgment that described the information the United Kingdom received from the United States regarding Mohamed's treatment during interrogation. That court subsequently reconsidered its decision, ordering the seven paragraphs to be made public.

On appeal, the Court of Appeal agreed, notwithstanding HMG's assertion that "the intelligence relationship between the United Kingdom and the United States is by far the most significant relationship the United Kingdom has from the point of view of internal security and the protection of broader international interest"⁷¹ and that revealing the intelligence information from the United States would be "profoundly damaging to the interests" of the United Kingdom.⁷² Indeed, the United States itself, under both the Bush and Obama administrations, had asserted that the release of this information would adversely affect the intelligence relationship.⁷³ The basis for the Court of Appeal's decision was its view that the information contained in the seven paragraphs already was public; it concluded that the United States had conceded that it had mistreated Mohamed, based on language in a public habeas decision reflecting that Mohamed had alleged torture and that the United States had not contested those allegations.⁷⁴ The Court of Appeal also cited the importance of "open justice,"⁷⁵ evidenced a skepticism that the Obama administration really would withhold important intelligence information from a close ally⁷⁶ and stated its own view that the information in the seven paragraphs would not undercut the UK's national security⁷⁷ in concluding that the paragraphs should be made public.

This decision is notable for at least three reasons. First, it illustrates the use of one State's courts to obtain information for use in another State's courts. Second, it

highlights a willingness by UK courts to look behind the UK government's national security judgments, even when the government has made clear its strong belief that a particular judgment will affect its ability to obtain future intelligence from its most important ally and that ally has made explicit on the record its views about the release of the information. Third, it illustrates that decisions in US habeas cases may have implications for foreign litigation. As noted above, all three Court of Appeal judges were influenced by their belief that the United States had, by choosing not to challenge Mohamed's allegations of mistreatment in another Guantanamo detainee's habeas case, effectively conceded that he had been tortured, thus making it far less important to preserve the secrecy of the seven paragraphs describing Mohamed's treatment.

The ongoing *Jeppesen* litigation reveals a similar interplay between litigation in US and UK courts. As noted above, Mohamed and four other defendants sued Jeppesen Dataplan in a US court. They also are suing a related subsidiary, Jeppesen UK, in a UK court. In July 2009, Jeppesen UK agreed to let the civil case brought by Mohamed go to trial.⁷⁸ Mohamed's counsel believe that, as a result, confidential information about his alleged rendition will become public, which likely will prove relevant to the US litigation.

Some of the same detainees filed a civil lawsuit against the United Kingdom, seeking compensation for the alleged complicity of UK authorities, including MI5 and MI6, in their torture and unlawful detentions. The UK government filed a response asking whether, in principle, the UK common law was sufficiently flexible to enable a court hearing on civil claims for damages to rely on a process whereby there would be parallel open and closed pleadings, disclosure, witness statements and hearings. The trial would be partly open and partly closed, as would the judgment. In the open elements of the proceedings, claimants' counsel would represent them in the normal way; for the closed elements, special advocates with security clearances would protect their interests but could not discuss the classified information with the claimants. In May 2010, the UK Court of Appeal held that such a closed procedure was not available in principle, in large part because

the principle that a litigant should be able to see and hear all the evidence which is seen and heard by a court determining his case is so fundamental, so embedded in the common law, that, in the absence of parliamentary authority, no judge should override it, at any rate in relation to an ordinary civil claim, unless (perhaps) all parties to the claim agree otherwise.⁷⁹

The United Kingdom sought permission to appeal to the UK Supreme Court. Although HMG's filings are not yet public, the United Kingdom presumably saw

itself as faced with an impossible choice between, on the one hand, withholding many documents that the United Kingdom would like and need to use to counter the allegations of misconduct by its officials and therefore allow the court to try the case fairly, and, on the other, disclosing all of those documents and thereby causing damage to the UK's national security interests. The UK government's other option—to seek public interest immunity certificates for as many as 140,000 documents—would have been incredibly time-consuming and seemed totally impractical.⁸⁰ Given the conundrum in which it found itself, it is not surprising that the United Kingdom announced in November 2010 that it settled the case with Mohamed and six other former Guantanamo detainees, reportedly for millions of pounds.⁸¹ In addition, the UK plans to seek a “judicial inquiry” about its possible role in facilitating US renditions.⁸² Any revelations in that inquiry seem likely to lead to further litigation (in both UK and US courts), unless the inquiry's findings remain confidential.

Canadian/Swedish Cases

Canada took a very different approach than the United States in dealing with allegations that its government contributed to the transfer of Mr. Arar to Syria, where he claims he was tortured. A judicial inquiry in Canada concluded that the United States expelled Arar to Syria based on false assertions from the Royal Canadian Mounted Police to US officials that Arar was linked to al Qaeda. Canada paid Arar C\$10.5 million to settle his litigation and the Prime Minister issued him an apology.⁸³ Likewise, Sweden paid three million kronor to Ahmed Agiza, an individual allegedly handed over by Sweden to the CIA and rendered to Egypt, where he was mistreated.⁸⁴ Although the United States has come under pressure to compensate Arar too, it has declined to do so.

III. Real-World Effects of Litigation Wins and Losses

Having reviewed the types of cases that individuals have brought and seen the sharp divergences in the outcomes of litigation in the United States and European States, one must ask: Does the litigation matter? Have the outcomes of these cases had a real effect on how these States fight conflicts? The answer is a clear yes, both for the States that are parties to the litigation, and for third States.

Claims of Unlawful Detention

Litigation regarding unlawful detention has had an impact on both the United States and European States, though the impact is not the same for each group. As an immediate matter, courts have ordered the United States to transfer a number

of detainees as a result of the Guantanamo habeas litigation. The litigation has had other, less direct effects as well. First, it has forced the judicial branch to opine on the scope of people whom the United States legally may detain, a decision that, before *Boumediene*, largely was in the hands of the executive. The developing habeas caselaw thus narrows the executive branch's discretion, at least with regard to those detained at Guantanamo and arguably with regard to anyone the United States is detaining pursuant to the 2001 Authorization for Use of Military Force.⁸⁵ That said, the district courts have only narrowed slightly the US government's asserted definition of who it can detain at Guantanamo.⁸⁶

Second and relatedly, the litigation appears to have affected—at least on paper—the type of person the United States is choosing to detain in Afghanistan. Subsequent to the US filing on March 13, 2009, in which the government proffered its view of the scope of its detention authority over Guantanamo detainees, the Department of Defense modified its detention policy in Afghanistan to track that definition.⁸⁷ It is unclear the extent to which this change has affected whom the United States is detaining in Afghanistan, however.⁸⁸ Third, the fact that the judiciary has upheld the continued detention of some at Guantanamo may be having a positive effect in that it illustrates to those who are highly skeptical of the executive branch's arguments about whom it is detaining that another branch of government, seen as more neutral, is affirming the legality of some of the detentions.

For the United Kingdom and other States parties to the ECHR, the scope of their ability to conduct security detentions during armed conflict and the procedures that they must provide to those they detain remain unsettled. There does not appear to be public information about how the United Kingdom has implemented the holdings of *al-Skeini* and *al-Jedda* on the ground, perhaps in part because the United Kingdom is no longer detaining anyone in Iraq. However, the *al-Jedda* decision makes it quite likely that the United Kingdom and other European States will push hard to obtain UN Security Council resolutions in advance of using force abroad. Further, European States may begin to seek specific authorization to detain (rather than a more general authorization to take "all necessary measures"), to make plain that the right to conduct security detentions is authorized under a particular UN Charter Chapter VII resolution. Obtaining a Security Council resolution could at least narrow the scope of application of human rights law to activities in armed conflict, but it will not obviate the need for the United Kingdom (and possibly other States parties to the ECHR) to consider ECHR requirements, particularly given the admonitions of several Law Lords that at least part of ECHR Article 5 remains intact in the face of UNSCR 1546, which authorized States to take all necessary measures to contribute to the maintenance of the security and stability of another country. Another option would be for States parties to derogate from

ECHR Article 5, as authorized by ECHR Article 15, though a State that decided to do so would face high political costs.

Presumably ECHR States parties also will consider carefully whether—and how—to act in accordance with other ECHR rights, such as the right to life and the right not to be subjected to inhuman or degrading treatment (either by the ECHR State party that initially detains the person or by another State to which the first State transfers the person), during armed conflict and peacekeeping operations.⁸⁹

Even if States conclude that they do not have legal obligations to apply the ECHR in most overseas situations—a view that generally would be consistent with the language in *Bankovic v. Belgium*—they may begin to do so as a matter of policy and prudence. For example, it might be that the transfer rule that the International Security Assistance Force (ISAF) established in Afghanistan (that is, that ISAF forces would transfer detainees to the Afghan government within 96 hours of detaining them) was crafted by ISAF States with an eye toward ECtHR Article 5 caselaw. (In *Brogan v. United Kingdom*, the ECtHR concluded that a particular detention by the United Kingdom—in which UK officials held a person for 103 hours without bringing him before a judge or releasing him—violated ECHR Article 5.⁹⁰ Those crafting the 96-hour rule may have been trying to estimate a pre-court detention length that the ECtHR would find acceptable.)

These considerations—and the ability of individuals affected by armed conflict to bring cases directly against the governments for alleged violations of domestic or international law—mean that European States increasingly are inclined to take a more cautious approach to detention. European ISAF forces are choosing to detain few enemy fighters, and some States ultimately ceased to detain any, even while their troops remained present in Afghanistan.⁹¹ This poses problems for force protection and intelligence collection, and places practical burdens on forces. The most obvious problem with a very cautious use of detention is that it leaves many individuals known to be hostile to ISAF forces—including those caught shooting at or bombing those forces or Afghan civilians—free to engage in the same kind of conduct over and over. This makes the already dangerous job of an ISAF soldier even more dangerous, and it arguably delays the ability of ISAF forces to provide security to Afghans, something most ISAF States agree is an important element of reconstruction. A reluctance to detain inadvertently can provide incentives to kill rather than capture—not a desirable outcome from an intelligence or counterinsurgency point of view. The 96-hour rule also hinders intelligence collection. This is not to suggest that ISAF and Afghan authorities should not pursue the goal of prosecuting individuals to the extent possible, but it is to suggest that concerns about litigation in this context are adversely affecting ISAF's work.

Claims of Unlawful Treatment

As noted above, US courts have not handed victories to plaintiffs who sued government officials based on allegations that those officials had a hand in their mistreatment. Thus, these cases have had little practical effect on the US government, though of course events such as the detainee abuse at Abu Ghraib and other revelations of detainee mistreatment shone a harsh spotlight on US detention practices and resulted in both legislation (such as the Detainee Treatment Act of 2005)⁹² and executive orders (such as Executive Order 13491,⁹³ drafted to ensure that all US employees and agents treat detainees in a manner consistent with Common Article 3 of the Geneva Conventions).

In contrast, a case such as *al-Skeini* seems likely to have a significant impact on the UK government. The concession by the UK government that the ECHR applies to its detention facilities in foreign war zones suggests that the United Kingdom may be inclined to treat all future overseas detentions during armed conflict or peacekeeping operations as being covered by the ECHR. Some questions remain unanswered, such as whether the ECtHR's caselaw on what constitutes "cruel, inhuman, or degrading" detention conditions in the United Kingdom sets a baseline for conditions at UK overseas detention facilities and, per the *Soering* principle, for conditions in the facilities to which the United Kingdom seeks to transfer someone.⁹⁴ At the very least, the ECHR's requirement that a State party conduct an "independent and impartial" investigation into an alleged violation of the ECHR would attach to any alleged violations that took place in UK detention facilities abroad.⁹⁵

Claims of Unlawful Transfer

The real-world impact of the transfer litigation in US courts is minimal. In view of *Munaf* and *Kiyemba II*, the only principle with which the United States must comply when transferring a detainee picked up in a non-international armed conflict is one that the United States already follows: it cannot transfer a person when it is more likely than not that he will be tortured.⁹⁶ The other aspects of a transfer—the identity of the receiving State, the conditions under which the person will be transferred and the timing of transfer—are left to the executive branch.

Even though Canada won its Afghan transfer litigation, the case arguably still had a chilling effect on Canada's actions during armed conflict. From November 2007 to February 2008, pending Amnesty International's request for an interim injunction against transfers, Canada chose not to transfer detainees to the Afghans, presumably relying instead on short-term, ad hoc detention arrangements.⁹⁷ A top Canadian general stated publicly that if Canada lost the Amnesty International case, Canadian troops would have been unable to detain combatants and would have been forced to hunker down in secure bases. This would effectively have ended

Canada's contribution to the ISAF mission and would have taken a significant NATO troop contributor off the battlefield.⁹⁸ Even after its win in the litigation, the Canadian government's Afghan detention policy remains under significant political pressure in light of allegations that the government knew that IROA mistreated detainees at the time that Canada handed its detainees to IROA. Opposition members of the Canadian Parliament have held hearings and are demanding access to unredacted versions of relevant military records.⁹⁹ In view of this intense public scrutiny, it seems safe to assume that Canadian forces in Afghanistan are choosing to detain few, if any, individuals on the battlefield out of concern that their troops will have nowhere to transfer the detainees. The litigation thus appears indirectly to have had a significant impact on Canadian detention policy.

Litigation has had an even more direct impact on UK detention policy. The death penalty appears to be the third rail for the ECtHR, such that any transfers of detainees who might realistically face the death penalty are certain to be deemed unlawful by that court. This suggests that any State party in that situation will seek death penalty assurances from the receiving State, even if the transferring State's judgment is that it is unlikely to be able to obtain such assurances. Coupled with concerns about mistreatment of transferred detainees, as in the *Evans* case, it seems almost certain that as transfers get harder, States will reduce the number of individuals they detain in the first place.¹⁰⁰ It also means that States are placing additional weight on their ability to monitor a detainee after he is transferred, something they will not always be able to secure. Indeed, the *Evans* court placed explicit conditions on the UK's ability to continue to transfer detainees to certain NDS facilities; these conditions include that

- (i) all transfers must be made on the express basis . . . that the UK monitoring team is to be given access to each transferee on a regular basis, with the opportunity for a private interview on each occasion; [and] (ii) each transferee must in practice be visited and interviewed in private on a regular basis.¹⁰¹

It seems fair to say that this transfer litigation has caused the United Kingdom to be far more circumspect in detaining belligerents or civilians taking direct part in hostilities in Afghanistan, and thus directly has impacted the way the UK conducts itself on the battlefield.

Claims about Intelligence Activities

It is difficult to predict the real-world implications if Binyam Mohamed succeeds in his case against Jeppesen Dataplan. If a court found the company liable for Mohamed's alleged mistreatment during part of his time in detention (and implied

a relationship between Jeppesen and the US government), it presumably would have a chilling effect on other contractors who are deciding whether to perform particular activities for the US government. It is difficult to say how much of a chilling effect it would have, though. If the Supreme Court granted certiorari and Mohamed won his case against Jeppesen in the United States, it seems very likely that the UK courts would take that into account in the litigation before them. Likewise, if his UK litigation against Jeppesen results in any disclosure of confidential information about the rendition program, that would make it easier for his US lawyers to use that information in US court and avoid the state secrets privilege by claiming that the information already was public.¹⁰²

The litigation by Mohamed seeking access to US intelligence reports in the UK's possession has the potential to affect intelligence sharing between the United States and the United Kingdom. In a letter to the United Kingdom, former State Department Legal Adviser John Bellinger wrote, "We want to affirm the public disclosure of these documents is likely to result in serious damage to US national security and could harm existing intelligence information-sharing arrangements between our two Governments."¹⁰³ The Obama administration affirmed that view.¹⁰⁴ In the wake of the release of the seven paragraphs, a White House spokesman stated, "We're deeply disappointed with the court's judgement because we shared this information in confidence and with certain expectations. As we warned, the court's judgement will complicate the confidentiality of our intelligence-sharing relationship with the United Kingdom, and it will have to factor into our decision-making going forward."¹⁰⁵ Because the two governments are unlikely to say more publicly about how and the extent to which intelligence sharing may be affected, it is difficult to assess the actual impact of the case. One might expect, though, that intelligence officers of each government now may be aware that the information they exchange with each other might be at risk of release to a court (and eventually to the public), especially in legally contentious areas such as those discussed here.

The Jeppesen litigation, the damages litigation against the United Kingdom by former Guantanamo detainees and the Binyam Mohamed treatment litigation all stem from allegations that the United Kingdom assisted the United States in rendering and detaining individuals believed to be fighting the United States. As a general matter, this seems likely to heighten the UK's caution when cooperating with the United States on sensitive issues, because the political, financial and resource-related costs for the United Kingdom have been high, even if the plaintiffs ultimately lose their cases. At a time when intelligence cooperation among allies is critical, this is an unfortunate development.

Penumbral Effects

In addition to the specific real-world implications that flow from each set of litigation, there are a few other ways in which this type of litigation will affect how States fight armed conflicts, particularly (but not exclusively) for European States.

First, this litigation sets precedent that litigants will use in future litigation associated with non-international armed conflicts. Unlike decisions made exclusively by the executive branches of governments, court decisions such as those in the United Kingdom bind the government, not just in the specific cases before the courts, but also in factually similar situations in the future. Of course, decisions in the ECtHR create precedent not just for the State involved in the suit, but also for all other States parties to the ECHR.

Second, the sheer quantum of litigation creates penumbral concerns about operating in “gray areas” where the legal rules are not black and white. This may cause European States to take the opposite approach from the one made famous by then-Deputy Director of National Intelligence Michael Hayden, who stated, “We’re going to live on the edge. . . . My spikes will have chalk on them. . . . We’re pretty aggressive within the law.”¹⁰⁶ Knowledge that courts have been reasonably sympathetic to the extension of human rights rules to armed conflict cannot but cause States to think hard when considering establishing a policy that may not be consistent with human rights principles, even if it is consistent with the law of war.

Third, if one State in a military coalition such as NATO loses a case and is forced to change its policy, that almost certainly will affect the operations and policies of other States within that coalition, as well as non-coalition States involved in the conflict. For example, if a court concludes that State A, which is fighting a conflict against non-State actors in State B, may not transfer detainees in its custody to State B, State A is likely to have to rely on its coalition partners (or State B) to detain individuals in the first instance. Thus, a litigation loss by one coalition partner may affect another partner that itself has won similar litigation. Therefore, it is in the interest of those challenging State practices during armed conflict to litigate in as many fora as possible in order to increase the likelihood of success and of having a policy and operational impact greater than the actual litigation victory.

IV. Reasons for Divergence and Future Steps

Part II identified a series of cases and a trend within US courts to limit litigation about decisions made by the United States (as well as other States and contractors) during armed conflict, in contrast to a trend within UK courts and the ECtHR to allow such litigation and to review (and often deem unlawful) the decisions and actions taken by the United Kingdom during armed conflict (or during activities

related to the US conflict with al Qaeda). This Part considers possible reasons for this divergence.¹⁰⁷

Reasons for Diverging Outcomes in US and European Cases

One possible reason for the divergence is the strong tradition of deference in the US system to the executive in areas of national security and armed conflict.¹⁰⁸ Bolstered by doctrines such as the political question and act of state doctrines and the rule of non-inquiry, courts generally have hesitated to step into certain areas that are likely to have a direct impact on foreign policy decisions by the executive branch. While the UK courts have used a doctrine of “justiciability” that is similar to the US political question doctrine, it appears that in the past few years UK courts have taken a more robust approach to judicial review of executive national security decisions. For example, in *A v. Secretary of State for the Home Department*, the House of Lords held that the legal regime that permitted the United Kingdom to detain certain terrorist suspects without trial was inconsistent with the ECHR.¹⁰⁹ As one scholar has written, “The decision appears to presage a new judicial boldness regarding national security—a sphere in which scrutiny by British courts has traditionally been blunted by a self-imposed custom of judicial deference to the executive branch.”¹¹⁰ This stands in contrast to the traditional view of UK courts that they should not

set aside administrative decisions save where they were aberrant or totally “unreasonable”—a doctrine of judicial self-restraint that bit with particular force when national security was at stake. The extent to which the [Human Rights Act] frees British courts from these shackles by encouraging the use of the more intensive proportionality test favored by the European Court of Human Rights has been the subject of considerable controversy. Courts and commentators have expressed quite diverse views as to how much deference should be extended to the policies of the executive and legislature by courts charged with determining whether a given measure breaches an ECHR right.¹¹¹

A second, related element that is fostering this divergence is the way in which the United States and European States approach their international human rights obligations. The US executive branch consistently has taken the position that the International Covenant on Civil and Political Rights (ICCPR)¹¹² does not apply extraterritorially. US courts accordingly have not sought to extend the application of the ICCPR to US activity overseas. (Nor have courts determined that the treaty is self-executing.) Indeed, given how cautious US courts have been in extending constitutional rights extraterritorially, it is no surprise that the ICCPR has not served as a mechanism for US litigants to persuade courts to apply human rights principles to US activity abroad, including during armed conflict.

Conversely, all States that are members of the Council of Europe (including all European Union States) are parties to the ECHR, which essentially serves as a “bill of rights” for these States, and which applies during both peacetime and wartime.¹¹³ As has been discussed throughout this article, the ECHR contains an enforcement mechanism—the European Court of Human Rights—which hears and decides cases brought by individuals against States parties (as well as by States against other States). Decisions from the ECtHR (and from domestic European courts interpreting the ECHR), including those discussed above, are a critical—and underreported—factor affecting the rules by which Europeans have fought—and will fight—conflicts. If European historical and political concerns about armed conflict serve as a “pushing” mechanism away from conflict, the ECHR serves as a “pulling” mechanism toward the increasing application of human rights rules to warfighting. In the view of one scholar who has written on this issue, “European governments increasingly have to take into account the possible effects of the European Convention on military operations both at home and abroad.”¹¹⁴

Indeed, section 2(1) of the UK’s Human Rights Act requires UK courts, when considering a question that arises in connection with an ECHR right, to consider relevant ECtHR caselaw.¹¹⁵ Although ECtHR decisions do not constitute formally binding precedent for UK courts, “the fact that a complainant unable to get a remedy at the domestic level can take the matter to Strasbourg increases the pressure on UK courts to produce outcomes consistent with European jurisprudence.”¹¹⁶ The HRA thus may account for reduced judicial deference in UK courts in areas that traditionally did receive deference, such as national security decisions.

Others are more skeptical that the ECHR has played a major role in affecting European warfighting. In this view, actions by European governments and their armed forces are driven as much by a fear of triggering criminal law prohibitions, including murder, torture and other offenses derived from their International Criminal Court obligations, as by a concern about litigation in the ECtHR. Further, some believe that using human rights principles to fill in gaps in the laws of war may help win hearts and minds, and thus better achieve the States’ military goals. Yet others believe that certain European States use the applicability of the ECHR as an excuse not to undertake certain lawful, though politically unpopular, activities, even though they may not be overly concerned about actually losing a case before the ECtHR. It may even be the case that some government officials hope, through the application of human rights rules, to make conflict harder to fight, and thus to stem the frequency of conflict.

A third reason that the US government may prevail more often in its courts is because the United States has a vibrant ongoing debate about national security issues, with loud and persuasive voices on both sides of the political spectrum (as

well as in the middle). Judges considering these types of cases have been exposed to the whole range of arguments about why certain national security decisions are sensible or indefensible. Although these arguments may not factor directly into a judicial decision, atmospherics matter. Indeed, one might point to a wide range of views among the federal judges considering detention cases (and identify a divide loosely along partisan lines) as an illustration of the breadth of judges' positions on national security-related issues. In contrast, the United Kingdom (and other States in Europe) appear to have fewer politicians, journalists and academics making compelling public arguments about the importance of a robust national security policy; the louder voices come from the human rights community. Judges, being human, are influenced by what they do—and do not—hear. Thus, it may be the case that the UK court decisions, which of late have tended to favor human rights arguments over national security arguments, stem in part from the atmospherics in the country, which largely are set by those who prioritize civil liberties over national security arguments.¹¹⁷

Ways to Mitigate the Divergence

It is beyond cavil that the type of litigation described above is having a very real impact on how States are fighting conflicts. For those who have brought and won their cases against States, this impact is all for the good. For States losing the cases, this impact can be detrimental, particularly where the judicial decision insufficiently takes into account operational realities of armed conflict and thus leaves States with no acceptable options. (This is not to suggest, however, that State officials should bear no accountability if they violate the law, as is discussed below.) What steps might these States take to minimize the occurrence of this litigation (and maximize their ability to win cases when litigation arises)?

A good first step would be for States' political leadership to make the national security arguments clearly and persuasively to their judges, parliamentarians and the European publics. For European governments to gain greater support for defense missions, they need to better educate their publics about why the current military missions are important for European security. To date, they have been slow to do so. For example, it took two years for German Chancellor Angela Merkel to give a speech to the German parliament about Afghanistan (and Germany's role in ISAF) or to visit Afghanistan.¹¹⁸ Of course, it is the European parliaments that ultimately must fund military expenditures, and that can offer constructive support or open criticism of European participation in ISAF and other operations. European cabinets should ensure that their parliamentarians are sufficiently briefed on various threats; parliamentary concerns are a major reason that the German government, for instance, has limited its presence and role in Afghanistan. Yet many

domestic parliaments do not have access to important intelligence information. France, for instance, lacks a parliamentary intelligence oversight committee.¹¹⁹ Even in States in which parliaments have not served as major stumbling blocks to European participation in coalitions, parliaments that are well-educated about the threats can serve as another bridge between the government and the public.

Another step—and an important one for the US government—would be to recognize the interconnectedness of this litigation and the fact that a State's national security policy decisions now have an impact that extends beyond that State's courts. The US and European governments should avoid, to the greatest extent possible, surprising each other with changes in laws or with high-impact court decisions. The best way to do this is to hold early consultations with close allies on pending legislation or court cases that could affect how that State conducts itself during armed conflict. For instance, Canada convened a meeting of ISAF partners to describe a court case it faced regarding detention in Afghanistan. One can imagine any of a number of other existing fora in which relevant State officials could hold such discussions.

A final step—and one that will require further study—is to consider whether certain principles drawn from counterinsurgency (COIN) doctrine offer ways to minimize litigation in the future. For example, one source of problems in the transfer litigation is the weakness of the host government, which results both in subpar detention facilities and in a weak domestic law enforcement system that is unable to prosecute those who engage in detainee abuse. The US COIN manual emphasizes the importance of building up the domestic institutions of the State under challenge from insurgents.¹²⁰ Doing so—creating better detention facilities, better-trained guards and stronger prosecution systems—would improve the conditions into which the United States and European States hope to transfer detainees, and thus would reduce litigation in the transfer realm. Further, it should be apparent to all States participating in ISAF that any legal violations or abuses committed by their troops are likely to come to light and are almost certain to undermine their COIN operations.¹²¹ With fewer actual (as opposed to falsely claimed) violations, the quantum of litigation should fall as well. Finally, COIN doctrine recognizes that *ex gratia* or *solatia* payments, made in sympathy or recognition of someone's loss during a conflict, may advance the cause of the State undertaking COIN.¹²² These payments, which are distinct from claims payments, may serve to diminish the impetus to bring legal claims against the State undertaking COIN.

States should consider other non-judicial mechanisms by which to hold themselves accountable. The mechanisms should be able to reflect operational realities in wartime, including the need to preserve intelligence relationships, while ensuring that the executive branches do not operate unchecked. These might include

internal investigations by entities such as inspectors general, which are housed within an agency, but independent from its leadership. These investigations could produce classified and unclassified versions of reports, as well as recommendations, where appropriate, that individuals wronged by governmental conduct be compensated. These might also include inquiries led by retired esteemed individuals such as retired federal judges (which appears similar to what the United Kingdom is considering in establishing an inquiry about its role in renditions). If seen as credible and fair, these types of investigations could also stanch the flow of litigation.

At the same time, an increased effort by the United States and European States to embed journalists and otherwise document their own compliance with the law, as well as to draw attention to violations of the law by non-State actors, may affect the outcomes of specific cases and may also improve for States the wider atmospherics surrounding the cases that non-State actors are bringing.

V. Conclusion

These cases illustrate that litigation is having an impact on how States currently fight, and on how they will fight in the future. This is not to argue against all judicial involvement in issues that implicate national security. It is to suggest, though, that such involvement should be measured and cautious; court judgments, while often addressing genuine problems with certain aspects of warfare, sometimes are crafted in ways that are overly abstracted from the choices that the losing governments have to make. Nor is this to suggest that executive branch decisionmakers should not have to comply with laws, regulations and related restrictions, or should not face criminal sanctions when their behavior warrants it. It is to suggest the need for the judiciary to act with restraint in this area, and to suggest that in some cases there may be non-judicial mechanisms that are better tailored to thread the needle between oversight and accountability, on one hand, and the need to preserve the confidentiality of certain types of decision making and policies, on the other.

Notes

1. See, e.g., Mary Crane, *U.S. Treatment of Terror Suspects and U.S.-EU Relations*, CFR.ORG (Dec. 6, 2005), http://www.cfr.org/publication/9350/us_treatment_of_terror_suspects_and_useu_relations.html (describing how controversy over the use of renditions affected European domestic politics).

2. Exec. Order No. 13491, 74 Fed. Reg. 4893 (Jan. 27, 2009) (Ensuring Lawful Interrogations); Exec. Order No. 13492, 74 Fed. Reg. 4897 (Jan. 27, 2009) (Review and Disposition of

Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities); Exec. Order No. 13493, 74 Fed. Reg. 4901 (Jan. 27, 2009) (Review of Detention Policy Options).

3. Indeed, even foreign government officials and contractors sued in US courts for alleged violations of international law during armed conflicts against non-state actors have won their cases. See *Matar v. Dichter*, 563 F.3d 9 (2d Cir. 2009) (dismissing on common law immunity grounds case against former Israeli military official who authorized particular bombing); *Corrie v. Caterpillar*, 503 F.3d 974 (9th Cir. 2007) (dismissing on political question grounds case against company accused of aiding and abetting war crimes by knowingly selling bulldozers to Israeli government).

4. Notably, there have been few cases in which individual victims of US and European aerial bombings during armed conflict have sued to obtain compensation for their losses. This presumably is due to statutes that quite clearly bar such causes of action, such as the Federal Tort Claims Act (FTCA) in the United States and comparable provisions in other States' laws, as well as judicial doctrines related to non-justiciability. See *El-Shifa Pharmaceutical Industries Co. v. United States*, 607 F.3d 836 (D.C. Cir. 2010) (holding that decision to launch missile strike abroad presents non-justiciable political question); *Bankovic et al. v. Belgium et al.*, App. No. 52207/99, 2001-XII Eur. Ct. H.R., available at 41 INTERNATIONAL LEGAL MATERIALS 517 (rejecting suit by victims of an aerial bombing in Kosovo); *German Court Rejects Civilian War Damages Claim*, DW-WORLD.DE (Nov. 2, 2006), <http://www.dw-world.de/dw/article/0,,2223146,00.html>.

5. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) ("There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF [Authorization for Use of Military Force]. We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use."). As a US citizen, Hamdi was not held at Guantanamo, but his case nonetheless is relevant to the scope of US detention authority.

6. *Hamdan v. Rumsfeld*, 548 U.S. 557, 562 (2006) (referring to "the relevant conflict" between the United States and al Qaeda).

7. *Rasul v. Bush*, 542 U.S. 466 (2004) (holding that Guantanamo detainees were entitled to statutory habeas corpus); *Boumediene v. Bush*, 128 S. Ct. 2229 (2008) (holding that Guantanamo detainees were entitled as a constitutional matter to habeas corpus).

8. HUMAN RIGHTS FIRST, HABEAS WORKS 1–2 (2010), available at <http://www.humanrightsfirst.info/pdf/Habeas-Works-final-web.pdf> [hereinafter HABEAS WORKS] (suggesting that the courts generally have followed the US government's proposed scope of detention).

9. See BEN WITTES, ROBERT CHESNEY & RABEA BENHALIM, *THE EMERGING LAW OF DETENTION: THE GUANTANAMO HABEAS CASES AS LAWMAKING* (2010) [hereinafter EMERGING LAW OF DETENTION] (noting that the Supreme Court in *Boumediene* "refused to define the contours of either the government's detention authority or the procedures associated with the challenges" and that this "placed an astonishing raft of difficult questions in the hands" of federal judges); HABEAS WORKS, *supra* note 8, at 29 (noting that the Guantanamo litigation has tested the judiciary but arguing that the judiciary has risen to the challenge).

10. Chisun Lee, *Judges Reject Interrogation Evidence in Gitmo Cases*, PRO PUBLICA (Aug. 13, 2010), <http://www.propublica.org/article/judges-reject-interrogation-evidence-in-gitmo-cases>.

11. *Boumediene*, 128 S. Ct. at 2259.

12. *Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010).

13. *Id.* at 98.
14. *Id.* at 95.
15. *Id.* at 99. The court did not decide what would happen if there were evidence that the US government had brought the person to Bagram in an attempt to evade habeas corpus, stating, We need make no determination on the importance of [the possibility that the United States chose a place of detention in order to evade judicial review], given that it remains only a possibility; its resolution can await a case in which the claim is a reality rather than a speculation.
16. *R (on the application of Al-Jedda) v. Secretary of State for Defence*, [2007] UKHL 58.
17. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.
18. In addition, ECHR Article 5 states, “Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”
19. S.C. Res. 1546, ¶ 2, U.N. Doc. S/RES/1546 (June 8, 2004).
20. *Al-Jedda*, [2007] UKHL, ¶ 39.
21. *Id.*, ¶¶ 39, 125–29, 136.
22. *Id.*, ¶¶ 126–29 (“The right is qualified but not displaced. This is an important distinction, insufficiently explored in the all or nothing arguments with which we were presented. . . . The right is qualified only to the extent required or authorised by the resolution. . . . We have devoted little attention to the precise scope of the authorisation. There must still be room for argument about what precisely is covered by the resolution and whether it applies to the facts of this case.”).
23. For a discussion of the conflict between the norms of the ECHR and the laws of war, see Marco Milanovic, *Norm Conflicts and Human Rights*, EJIL: TALK! (May 13, 2009), <http://www.ejiltalk.org/norm-conflicts-and-human-rights/>.
24. For an example of a suit against a contractor for detainee abuse, see *Saleh v. Titan*, 580 F.3d 1 (D.C. Cir. 2009) (holding that combat activities exception to the FTCA precluded suit by hundreds of Iraqi detainees against contractors providing interrogation and translation services at U.S. detention facilities in Iraq, including Abu Ghraib).
25. *Rasul v. Rumsfeld*, 414 F. Supp.2d 26 (D.D.C. 2006).
26. *Rasul v. Myers*, 512 F.3d 644 (D.C. Cir. 2008); *Rasul v. Myers*, 129 S. Ct. 763 (2008).
27. *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009).
28. *Id.*, at 529, 530.
29. *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 3409 (2010).
30. *Id.* at 575 (“A suit seeking a damages remedy against senior officials who implement an extraordinary rendition policy would enmesh the courts ineluctably in an assessment of the validity and rationale of that policy and its implementation in this particular case, matters that directly affect significant diplomatic and national security concerns.”).
31. *Id.* at 565.
32. See, e.g., Brief of Respondents at 12–13, *Hamdan v. Rumsfeld*, No. 03–6696, 542 U.S. 507 (2004).
33. *Al-Skeini and Others v. Secretary of State for Defence*, [2007] UKHL 26, [2008] 1 A.C. 153.
34. *Al-Skeini*, [2007] UKHL, ¶ 2.
35. Under ECtHR caselaw, including *Ozkan v. Turkey*, App. No. 21689/93, ¶¶ 311–14, 358 Eur. Ct. H.R. (Apr. 6, 2004), when a State considers that it might have violated Article 2, it must undertake an official investigation, ensure accountability for deaths, take steps to secure relevant evidence and ensure that the investigation be independent from those implicated in the events at

issue. Dominic McGoldrick, *Human Rights & Humanitarian Law in UK Courts*, 40 ISRAEL LAW REVIEW 527, 551 (2007).

36. *Al-Skeini*, [2007] UKHL, ¶¶ 3–4.

37. *Id.*, ¶ 61. It conceded that the ECHR applied to Mr. Mousa's case after a lower court finding that a UK-run detention facility fell within a narrow exception to the general rule (as articulated in *Bankovic v. Belgium*) that the ECHR does not apply outside the territories of States parties to the Council of Europe. Mr. Mousa's detention in the *al-Skeini* case occurred before the UN Security Council had passed a resolution authorizing Multi-National Forces–Iraq to take “all necessary measures” to ensure the security and stability of Iraq; al-Jedda's detention occurred after the Security Council passed UNSCR 1546, which explains why the United Kingdom attempted to argue that a Security Council resolution could effectively trump other international legal obligations.

38. Tobias Thienel, *High Court: British Soldiers in Iraq under ECHR Protection*, INVISIBLE COLLEGE BLOG (May 13, 2008), <http://invisiblecollege.weblog.leidenuniv.nl/2008/05/13/high-court-british-soldiers-in-iraq-unde>; see also McGoldrick, *supra* note 35, at 543.

39. McGoldrick speculates that there was a division of views between the “Ministry of Defence, which took the view that the HRA does not apply in Iraq at all (which explains why the UK has never derogated from the ECHR or the ICCPR), and the Foreign and Commonwealth Office, which took the view that it does exceptionally apply.” McGoldrick, *supra* note 35, at 555–56.

40. *Omar v. Harvey*, 410 F. Supp.2d 19 (D.D.C. 2006); *Mohammed v. Harvey*, 456 F. Supp.2d 115 (D.D.C. 2006).

41. *Munaf v. Geren*, 553 U.S. 674, 688 (2008).

42. *Id.* at 688.

43. *Id.* at 699–700.

44. *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009).

45. *Kiyemba v. Obama*, 130 S. Ct. 1880 (2010).

46. *Munaf*, 553 U.S. at 702 (appearing to reserve the “extreme case” in which the executive determines that a transferee is likely to face torture but chooses to transfer him anyway).

47. *Amnesty International Canada v. Canada* (Chief of the Defence Staff) [2008] F.C. 336, available at <http://decisions.fct-cf.gc.ca/en/2008/2008fc336/2008fc336.html>.

48. *Amnesty International Canada v. Canada* (Chief of the Defence Staff), 2008 FCA 401, [2009] 4 F.C.R. 149, available at <http://recueil.cmf.gc.ca/eng/2008/2008fca401/2008fca401.html>.

49. *Al-Saadoon & Mufdhi v. United Kingdom*, App. No. 61498/08 (Judgment), Eur. Ct. H.R. (Mar. 2, 2010), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=prof&highlight=al-saadoon&sessionid=58994524&skin=hudoc-en>.

50. *Id.*

51. The divisional court declared the proposed transfer lawful. [2008] EWHC 3098 (Admin).

52. *R (on the application of Al-Saadoon) v. Secretary of State for Defence*, [2009] EWCA (Civ) 7, ¶¶ 32–33, 37–39.

53. *Al-Saadoon*, App. No. 61498/08, ¶ 143 (Judgment).

54. *Al-Saadoon*, App. No. 61498/08, ¶ 88 (Admissibility Decision) (June 30, 2009) (“The Court considers that, given the total and exclusive *de facto*, and subsequently also *de jure*, control exercised by the United Kingdom authorities over the premises in question, the individuals detained there, including the applicants, were within the United Kingdom's jurisdiction.”), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=852086&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA3986>.

55. Al-Saadoon, App. No. 61498/08, ¶ 143 (Judgment).

56. *Id.*, ¶ 141 (declining to give deference to HMG's judgment that raising such a prospect with the Iraqis would have been impolitic); *see also* ¶ 169 (noting HMG's assertion that "[c]areful further consideration had been given to these matters and it was the Government's considered view that the diplomatic representations sought would be inappropriate, could harm bilateral relations and would be ineffective") & ¶ 171 (ordering HMG to seek death penalty assurances).

57. *Id.*, ¶ 104.

58. Al-Saadoon, App. No. 61498/08, ¶ 81 (Admissibility Decision). The UK Ministry of Defence's Joint Doctrine Publication on the Handling of Detainees notes, in a section governing detainee transfers, "It should be borne in mind that the application of the European Convention on Human Rights to those held in UK facilities in some circumstances may impose additional restrictions on their transfer, in particular if they are likely to be tried for an offence which carries the death penalty." UK Ministry of Defence, JDP 1-10.3, Joint Doctrine Publication: Detainees ¶ 114 (2006).

59. The Queen (on the application of Maya Evans) v. Secretary of State for Defence, [2010] EWHC (Admin) 1445.

60. *Id.*, ¶¶ 1, 239.

61. *Id.*, ¶¶ 315–21.

62. El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007); Mohamed v. Jeppesen Dataplan, 614 F.3d 1070 (9th Cir. 2010) [hereinafter *Jeppesen II*].

63. *El-Masri*, 479 F.3d at 300–301.

64. *Id.* at 307–8.

65. *Id.* at 311.

66. *Jeppesen II*, 614 F.3d at 1076.

67. Mohamed v. Jeppesen Dataplan, 579 F.3d 943, 952 (9th Cir. 2009), *rehearing en banc granted*, 586 F.3d 1108 (9th Cir. 2009) (citing *Totten v. United States*, 92 U.S. 105 (1875)).

68. *Jeppesen II*, 614 F.3d at 1073.

69. *Id.* at 1081–82 (citations omitted).

70. For a summary of the procedural history of the case, see Binyam Mohamed v. Secretary of State for Foreign Affairs, [2010] EWCA (Civ) 65.

71. *Id.*, ¶ 11.

72. *Id.*, ¶ 5.

73. *Id.*, ¶¶ 95–98.

74. *Id.*, ¶¶ 121–26 (citing *Mohammed v. Obama*, 689 F. Supp.2d 38 (D.D.C. 2009)).

75. *Mohamed*, [2010] EWCA (Civ), ¶¶ 37–42.

76. *Id.*, ¶¶ 154, 172.

77. *Id.*, ¶ 52.

78. Jamie Doward, *Secrets of CIA "ghost flights" to be revealed*, THE OBSERVER (England), July 26, 2009, at 19, available at <http://www.guardian.co.uk/world/2009/jul/26/cia-rendition-guantanamo> ("Lawyers bringing the case against Jeppesen UK on behalf of the former Guantánamo Bay detainee, Binyam Mohamed, claimed last night the climbdown had wide-ranging legal implications that could help expose which countries and governments knew the CIA was using their air bases to spirit terrorist suspects around the world.").

79. Al Rawi & Others v. Security Service & Others, [2010] EWCA (Civ) 482, ¶ 30, available at <http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2010/482.html&query=binyam&method=boolean>.

80. *Id.*, ¶ 9.

81. Patrick Wintour & Matthew Weaver, *Guantanamo Bay prisoners to get millions from British government*, GUARDIAN.CO.UK (Nov. 16, 2010), <http://www.guardian.co.uk/world/2010/nov/16/guantanamo-bay-prisoners-compensation>.

82. Ian Cobain, *Council of Europe welcomes UK inquiry into torture and rendition*, GUARDIAN (London), June 10, 2010, at 5, available at <http://www.guardian.co.uk/politics/2010/jun/09/council-europe-welcomes-uk-inquiry-torture> (noting that the UK Foreign Secretary had confirmed that HMG would establish an inquiry but had not yet defined what form it would take).

83. Ian Austen, *Canada Reaches Settlement with Torture Victim*, NYTIMES.COM (Jan. 26, 2007), <http://www.nytimes.com/2007/01/26/world/americas/26cnd-canada.html> (quoting one of his US lawyers as saying that she hopes the Canadian settlement will increase pressure on the United States government to do the same).

84. *Sweden to compensate exonerated terror suspect*, NYTIMES.COM (July 3, 2008), http://www.nytimes.com/2008/07/03/world/europe/03iht-sweden.5.14218093.html?_r=1.

85. EMERGING LAW OF DETENTION, *supra* note 9, at 3 (“The rules the judges craft could have profound implications for decisions in the field concerning whether to initially detain, or even target, a given person, whether to maintain a detention after an initial screening, . . . and so forth.”).

86. See HABEAS WORKS, *supra* note 8 (describing district court decisions). In *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010), a panel of the D.C. Circuit decided that the United States had broader authority to detain than the government itself had claimed, because it asserted that international law does not limit the scope of the government’s detention authority. In rejecting a request for *en banc* review of the decision, seven D.C. Circuit judges appear to have concluded that that language was dicta. *Al-Bihani v. Obama*, 619 F.3d 1 (D.C. Cir. 2010).

87. Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay, In re Guantanamo Bay Detention Litigation, Misc. No. 08-442 (TFH) (D.C. Cir. Mar. 13, 2009); Brief for Respondent-Appellant, Addendum, *Maqaleh v. Gates*, Nos. 09-5265, 09-5266, 09-5277 (D.C. Cir. Sept. 14, 2009), available at <http://www.scotusblog.com/wp-content/uploads/2009/09/US-Bagram-brief-9-14-09.pdf> (containing new US detention policy in Afghanistan, which states that the modified procedures adopt the definitional framework of detention authority that the administration published in its March 13, 2009 habeas filing); Jennifer K. Elsea & Michael John Garcia, Congressional Research Service, *Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court* 40 n.235 (2010), available at www.fas.org/sgp/crs/natsec/RL33180.pdf (noting that although the March 13 standard referred only to detainees held at Guantanamo the Obama administration subsequently made clear in court filings and congressional reports that it would use the same standard to justify the detention of suspected belligerents at Bagram).

88. Because the new policy requires not only that a person meet particular criteria rendering him detainable, but also that US forces assess the level of threat that a person poses, DoD presumably is detaining fewer people in the first instance, though it is not clear whether those reduced numbers are due to the “scope” requirement or “threat” requirement.

89. This concern about the principle of “*non-refoulement*” is reflected in the decision of many European States that were present in Afghanistan to obtain assurances from the government of Afghanistan that it would treat humanely those detainees the European ISAF contingents transfer to the Afghans.

90. *Brogan v. United Kingdom*, 145 Eur. Ct. H.R. (ser. A) ¶ 62 (1988).

91. For a general discussion of ISAF’s limited detention activities, see Ashley S. Deeks, *Starting from Here*, in INTERNATIONAL LAW AND MILITARY OPERATIONS 161, 175–76 (Michael Carsten ed., 2008) (Vol. 84, US Naval War College International Law Studies).

92. Pub. L. No. 109-148, 119 Stat. 2739 (codified as amended in scattered sections of 10, 28 and 42 U.S.C.).

93. *Supra* note 2.

94. *See Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) ¶¶ 89–91 (1989) (concluding that it is possible to breach an ECHR obligation by transferring an individual to another State in which he might face treatment that violates the ECHR, even if the State party itself did not inflict that treatment on the person).

95. *See McGoldrick, supra* note 35 (noting that conducting such investigations would entail a significant departure from existing military practice).

96. *See, e.g.*, Press Release, Department of Justice, Special Task Force on Interrogations and Transfer Policies Issues Its Recommendations to the President (Aug. 24, 2009), *available at* <http://www.justice.gov/opa/pr/2009/August/09-ag-835.html>.

97. *See* ASHLEY S. DEEKS, PROMISES NOT TO TORTURE: DIPLOMATIC ASSURANCES IN U.S. COURTS 70 (2008), *available at* <http://www.asil.org/files/ASIL-08-DiscussionPaper.pdf> (describing policy recommendations intended to “ensure that U.S. practices in such transfers comply with U.S. law, policy and international obligations and do not result in the transfer of individuals to face torture”).

98. *Id.*

99. Allan Woods, *Censure Tories over probe of detainee abuse, MPs urged*, TORONTO STAR, Feb. 4, 2010, at A06, *available at* <http://www.thestar.com/news/canada/afghanmission/article/760370--censure-tories-over-probe-of-detainee-abuse-mps-urged>.

100. For a general discussion of this problem, see Ashley S. Deeks, *Detention in Afghanistan: The Need for an Integrated Plan* (Feb. 14, 2008), http://csis.org/files/media/csis/pubs/080213_deeks_afghanistan.pdf.

101. *The Queen (on the application of Maya Evans)*, [2010] EWHC (Admin), ¶ 320.

102. Binyam Mohamed’s attorneys have stated that this interaction between the UK and US litigation is a deliberate decision on their part. In an interview in which he was asked whether the UK’s actions would affect the US Jeppesen litigation, an Amnesty International attorney stated,

I would think so. I mean one would think the judges would look at government’s assertions of damage to national security in Jeppesen case, particularly in relation to Binyam Mohamed’s claims, with skepticism. Because if what the government is essentially trying to cover up in the Jeppesen litigation in the U.S. is the same as what it now publicly acknowledged in the U.K.—and I can’t see that it would be any different—it just makes their assertions increasingly improbable, and I think’ll be viewed, as I say, with skepticism. . . . I think it’s the way to pursue justice in a paradigm where you have the United States, both the prior administration and now this administration, trying to act outside the law by making assertions that these incidents arose outside of the United States, so therefore you can’t come into a United States courtroom to assert your rights. As advocates we now need to look outside the United States. In the same way that the U.S. administrations are looking outside the United States to justify their positions, we should be looking outside the U.S. to hold them to account.

Larry Siems, *Transnational Justice and the Binyam Mohamed Case*, THE TORTURE REPORT BLOGS (Mar. 1, 2010, 4:08 PM), <http://www.thetorturereport.org/diary/transnational-justice-and-binyam-mohamed-case>.

103. Richard Norton-Taylor, *Miliband faces new “torture cover-up” storm*, GUARDIAN (London), Feb. 16, 2009, Home Pages at 4 (quoting Bellinger letter).

104. UK: *Intelligence sharing with the US threatened*, JPOST.COM (July 29, 2009), <http://www.jpost.com/Home/Article.aspx?id=150287>.

105. White House “disappointed” at Binyam Mohamed ruling, POLITICS.CO.UK (Feb. 11, 2010), [http://www.politics.co.uk/news/foreign-policy/white-house-disappointed-at-binyam-mohamed-ruling-\\$1359476.htm](http://www.politics.co.uk/news/foreign-policy/white-house-disappointed-at-binyam-mohamed-ruling-$1359476.htm).

106. Dana Priest, *Covert CIA Program Withstands New Furor*, WASHINGTON POST, Dec. 30, 2005, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/29/AR2005122901585.html>.

107. For an extensive discussion of the US courts’ focus on process rather than substance in “war on terror” cases, see Jenny S. Martinez, *Process and Substance in the “War on Terror,”* 108 COLUMBIA LAW REVIEW 1013 (2008). Martinez argues that one reason US courts have focused heavily on procedural issues is that the litigants chose to present the issues to the courts as procedural ones.

108. See, e.g., David Jenkins, *Judicial Review under a British War Powers Act*, 43 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 611, 619 & n.36 (2010) (citing examples of American courts’ reluctance to get involved in matters of war). *Hamdan* and *Boumediene* arguably reflect important exceptions to this statement.

109. *A v. Secretary of State for the Home Department*, [2004] UKHL 56, [2005] 2 A.C. 68 (H.L.).

110. Mark Elliott, *United Kingdom: Detention Without Trial and the “War on Terror,”* 4 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 553, 553 (2006).

111. *Id.* at 561.

112. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966).

113. The fact that ECHR Article 15 permits States parties to derogate from certain rights during wartime makes clear that, barring a derogation, those rights, as well as the non-derogable rights, apply during wartime. See Charles H.B. Garraway, *Interoperability and the Atlantic Divide: A Bridge over Troubled Waters*, in ISSUES IN INTERNATIONAL LAW AND MILITARY OPERATIONS 337, 350 (Richard B. Jaques ed., 2006) (Vol. 80, US Naval War College International Law Studies) (noting that the ECHR applies in time of war, subject to any derogation). That said, the treaty is not perfectly crafted to handle wartime situations. For instance, Article 5, which contains an exclusive list of the situations in which a State may deprive people of their liberty, does not include the detention of prisoners of war during international armed conflict or administrative detention during non-international armed conflict, even though those forms of detention are otherwise permissible under international law.

114. *Id.* at 352.

115. Human Rights Act, 1998, c. 42, § 2(1).

116. Andrew Geddis & Bridget Fenton, “Which Is to Be Master?” – Rights-Friendly Statutory Interpretation in New Zealand and the United Kingdom, 25 ARIZONA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 733, 745 (2008) (noting that “if the United Kingdom’s domestic courts fail to provide an applicant with a satisfactory remedy under the HRA, he or she can always pursue the matter to Strasbourg and obtain a judgment from the ECtHR that will require the United Kingdom to alter its law in any case. To avoid such an outcome, [‘domestic’] courts should . . . treat the HRA as the nexus to a new legal order of European human rights law, so that every [domestic] court is now a European human rights court.”).

117. See, e.g., Gary Schmitt, *How Will British Elections Change Their National Security Policy?*, THE ENTERPRISE BLOG (Apr. 1, 2010, 12:09 PM), <http://blog.american.com/?p=12142> (“[G]iven the state of British public opinion these days about such matters as Afghanistan, Israel, and government budget deficits, one can hardly expect the Tories to come out with a more aggressive set of forward-leaning foreign and defense policies.”). Similar trends are found elsewhere in Europe.

See Wolfgang Ischinger, *Afghanistan and German Security Policy—A Few Thoughts to Remember*, MONTHLY MIND (Jan. 2010), <http://www.securityconference.de/Monthly-Mind-Detail-View.67+M5d625cd60f9.0.html?&L=1> (“We must in fact come up with our own explanations why German and European alliance interests require this mission [in Afghanistan]. The nation-building ideals that various German politicians set forth occasionally, which relate to human rights, women’s rights, social or democratic aspects, are not enough. . . . It is time for parliament and the government to deal with the strategic and tactical aims and options in Afghanistan instead of focusing their energies on the investigations into the events at Kunduz, trying to score points on the home front. . . . If Europe has ambitions of developing into a global player, shouldn’t we be interested in an active role of our own in Asia? Would a European withdrawal from Afghanistan not only be a disaster for NATO, but also a decisive step towards the global strategic irrelevance of Europe? . . . Such questions are asked too rarely in our country. They do, however, deserve answers—as part of a German and European debate on security policy that thinks in strategic terms and provides more than hasty and short-lived responses to daily events.”).

118. Judy Dempsey, *Merkel Is Aloof as German Public Wavers on Troops in Afghanistan*, NYTIMES.COM (Oct. 18, 2007), <http://www.nytimes.com/2007/10/18/world/europe/18iht-letter.1.7941391.html>.

119. Hans Born, *Parliamentary Oversight of Intelligence Services 1* (2006), <http://www.dcaf.ch/Publications/Series/Detail?lng=en&id=18411> (then Parliamentary Oversight of Intelligence Services hyperlink).

120. Headquarters, Department of the Army & Headquarters, Marine Corps Combat Development Command, FM 3-24/MCWP 3-33.5, *Counterinsurgency* (2006).

121. *Id.*, ¶ 1-107 (“Any human rights abuses or legal violations committed by U.S. forces quickly become known throughout the local population and eventually around the world because of the globalized media and work to undermine the COIN effort.”).

122. *Id.*, app. D, ¶ D-34.

XVII

Asymmetric Warfare: How to Respond?

Wolff Heintschel von Heinegg*

Introduction

Demands for a reform of the law of armed conflict are often justified by claiming that the “novel” phenomenon of asymmetric warfare has proven the inadequacy of that body of law. Allegedly, the law of armed conflict is characterized by a post-Westphalian approach, that is, its underlying concept is one of symmetric warfare between belligerents that will abide by its rules only because they expect their opponent to also abide (the principle of reciprocity). In asymmetric warfare reciprocity is said to have become obsolete and the allegedly “new” threats brought about by that “novel” phenomenon call for an adaptation of the law of armed conflict.

It will be shown in this article that asymmetric warfare is far from being unprecedented, and that either the law of armed conflict has been adapted to address past forms of asymmetric warfare or, in other instances, adaptation has been unnecessary despite the asymmetries. Accordingly, the calls for “new” law, if not unfounded, are, at a minimum, premature. It is conceded, however, that it has become increasingly difficult to cope with certain forms of asymmetry; therefore it is of the utmost importance to develop strategies that enable States and their armed forces to adequately respond to asymmetric warfare.

Finally, this article will focus on situations of armed conflict, whether of an international or of a non-international character. Cross-border—or so-called spillover—

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effects in a non-international armed conflict neither change the character of the armed conflict nor pose insurmountable problems.¹ If, for instance, non-State actors engaged in a non-international armed conflict seek refuge in a neighboring State, this does not necessarily mean that they will be immune from attack.

There may be situations, however, that do not qualify as an armed conflict even though armed forces are engaged in military operations against “asymmetric actors.” While the law of armed conflict will not be applicable in such circumstances, this does not mean that public international law is silent on the matter. For instance, counter-piracy operations are governed by the law of the sea or, as in the case of piracy off the coast of Somalia, by applicable UN Security Council resolutions.² Very often international human rights law—though contained in a regional convention—will play an important role.³ Counterterrorism operations may also be based on UN Security Council resolutions or on the inherent right of self-defense.⁴ It needs to be emphasized with regard to the latter, however, that States have not yet agreed upon the criteria that give rise to the right. Because of the variety of regimes that may be applicable, the armed forces deployed to counterterrorism operations all too often lack the legal clarity and legal security that are of vital importance for the success of contemporary military operations.

I. Forms of Asymmetric Warfare

Some of the past efforts to define asymmetric warfare have not been very helpful in identifying the underlying problems. For instance, asymmetric warfare used to be defined as “a conflict involving two states with unequal overall military and economic resources.”⁵ In reaction to the terrorist attacks of 9/11 the definition has been modified. Asymmetric warfare is now defined by one author as “leveraging inferior tactical or operational strength against [the] vulnerabilities of a superior opponent to achieve disproportionate effect with the aim of undermining [the opponent’s] will in order to achieve the asymmetric actor’s strategic objectives.”⁶ While this definition has the advantage of not being limited to inter-State armed conflicts, it has not added much, insofar as almost all armed conflicts have been asymmetric.

Asymmetries in warfare include asymmetries of power, means, methods, organization, values and time.⁷ Asymmetry can be participatory, technological, normative, doctrinal or moral.⁸ In that sense, wars have always been characterized by at least one form of asymmetry. For instance, any armed conflict involving the United States will by definition be asymmetric because of the technological superiority of the US armed forces. The same holds true for any armed conflict involving non-State actors, be they partisans, resistance fighters, rebels or terrorists. Moreover, it

must not be forgotten that in any war or armed conflict there is a considerable element of surprise that makes it impossible to predict its course or outcome. The enemy may employ methods, strategies or tactics not envisaged and that aim at the opponent's vulnerabilities. Asymmetry, therefore, is not a "novel" phenomenon as some would characterize it but an intrinsic characteristic of any war.⁹

It therefore seems that the term "asymmetric warfare," which is by no means a legal term of art, is nothing but a description of a fact of life. In this context, it is, however, important to bear in mind that warfare, particularly in Western societies, is perceived from a post-Westphalian perspective—that is, as armed hostilities predominantly conducted under State control and between combatants in which civilians and civilian objects are largely spared from violence and destruction. From the outset of its development in the middle of the nineteenth century, the modern law of armed conflict has been based on that approach. It must also be noted that, to a certain extent, the law of armed conflict recognizes—or implicitly accepts—the different forms of asymmetry. Still, the law's underlying concept is that of symmetric warfare in which the use of force is limited to lawful targets and is premised on the belief that the parties to the conflict will abide by its rules.

The development of the law of armed conflict has resulted in abolishing the prevalence of military necessity over considerations of humanity ("*Kriegsräson geht vor Kriegsmanier*") by establishing an operable balance between the two that, while placing limits on the means and methods of war, does not make warfare impossible.¹⁰ This approach has been, still is and will continue to be challenged by the conduct of hostilities in contemporary armed conflicts that are characterized by an increasingly structured and systematic deviation from the law. There is a growing "tendency for the violence to spread and permeate all domains of social life. This is because the weaker side uses the community as a cover and a logistical base to conduct attacks against a superior military apparatus."¹¹ Hence, in asymmetric warfare,

the weaker party, recognizing the military superiority of its opponent, will avoid open confrontation that is bound to lead to the annihilation of its troops and to defeat. Instead it will tend to compensate its inadequate arsenal by employing unconventional means and methods and prolonging the conflict through an undercover war of attrition against its well-equipped enemy.¹²

In summary, the term "asymmetric warfare" is to be understood as applying to armed hostilities in which one actor/party endeavors to compensate for its military, economic or other deficiencies by resorting to the use of methods or means of warfare that are not in accordance with the law of armed conflict (or of other rules

of public international law). It is important to stress that the motives or strategic goals of asymmetric warfare, while important to understand, are irrelevant from a legal point of view. Finally, the definition of asymmetric warfare here proposed does not mean that other forms of asymmetries are neglected.

II. Applying the Lex Lata

It needs to be emphasized from the outset that the law of armed conflict has never been modified with a view to compensate for technological dissimilarities between the parties to the conflict. For instance, Russia and the United Kingdom endeavored to outlaw the submarine as a means of naval warfare because it posed a considerable threat to their superior surface forces. Those efforts were in vain.¹³ Developments in weapons technology have at best been an incentive for a modification of the law with a view to meeting humanitarian considerations.¹⁴ (Although there are times when one cannot avoid the impression that humanitarian considerations are a pretextual argument for the true intention of abolishing war through the laws of war (correctly characterized as “lawfare”¹⁵).)

On the other hand, the law of armed conflict has been adapted to address certain forms of participatory asymmetries. For instance, many of the atrocities committed during the Second World War were justified as legitimate responses to the conduct of asymmetric warfare by the opposing belligerent, *inter alia*, by partisan attacks. That led to the killing of hostages and other innocent civilians, or to the wanton destruction of villages in territory occupied or under the control of the German *Wehrmacht*. The law of armed conflict has been progressively developed in order to eliminate such conduct in future armed conflicts.

Hence, the law of armed conflict accepts asymmetries in warfare, be they technological or doctrinal, and it reacts to such asymmetries only if there is a necessity of preserving minimum standards of humanity or of “alleviating as much as possible the calamities of war.”¹⁶ Moreover, the law of international armed conflict aims to maintain the public character of warfare by indirectly reserving the right to harm the enemy to a privileged group of actors.¹⁷

Normative and Moral Asymmetries

Normative and moral asymmetries, while sometimes posing considerable political and/or operational problems, are, in principle, irrelevant from the perspective of the law of international armed conflict.

This especially holds true with regard to the legality or illegality of the resort to the use of armed force under the *jus ad bellum*. According to the principle of equal application, the law of international armed conflict applies to every situation

amounting to an international armed conflict irrespective of the political or strategic goals pursued and irrespective of the legality of the resort to armed force by either of the belligerents.¹⁸ Therefore moral or normative asymmetries are, in principle, irrelevant, although they may have considerable political and strategic impact.

This also holds true for a resort to the use of armed force authorized or mandated by the UN Security Council. As emphasized in the 1999 UN Secretary-General's Bulletin, the "fundamental principles and rules of international humanitarian law . . . are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement."¹⁹

Moreover, the causes for a resort to the use of armed force have no impact on the scope of applicability of the law of armed conflict. There have been suggestions that military operations aiming at the protection of human rights are governed by stricter legal limitations than "regular" armed conflicts.²⁰ State practice, such as in the context of the Kosovo campaign, provides insufficient evidence to establish that such suggestions have a basis in existing law.²¹

Other normative asymmetries may have an impact on the law of armed conflict. Such normative asymmetries occur if the parties to an international armed conflict are not bound by the same treaties. As in general international law, law of armed conflict treaties only apply to States parties unless a State not party to a given treaty expressly accepts and applies it.²² Absent such a declaration, the hostilities will only be governed by customary international (humanitarian) law.

Treaties do not, however, become inapplicable if members of an alliance are not bound by the same treaties. The ensuing potential interoperability problems, that is, States within an alliance operating under different legal obligations, are often solved by a "matrix" solution. Thus, if a certain task involves conduct that would violate a treaty obligation of some alliance members, the force commander will entrust that task to units of States not bound by the treaty restrictions. The legality of such conduct has been recognized by Article 21(3) of the 2008 Convention on Cluster Munitions, which provides: "Notwithstanding the provisions of Article 1 of this Convention and in accordance with international law, States Parties, their military personnel or nationals, may engage in military cooperation and operations with States not party to this Convention that might engage in activities prohibited to a State Party."²³ Finally, States may differ on the interpretation of a treaty by which they are equally bound or of a rule of customary international humanitarian law. Again, the problem of interoperability is very often solved by either national caveats or by other procedural safeguards, such as the "matrix" solution.

Asymmetric Actors (Participatory Asymmetries)

It has been rightly stated that one of the characteristics of asymmetric warfare (as understood here) is that the “dividing line between combatants and civilians is consciously blurred and at times erased.”²⁴ This inevitably results in attacks against the civilian population and individual civilians, or even in conduct amounting to prohibited perfidy. Such conduct is far from new. The existing law of armed conflict is based on the experience of past armed conflicts and has, in principle, preserved the general distinction between protected civilians on the one hand and, on the other hand, persons who, either as combatants or as members of organized armed groups or as civilians, take a direct part in hostilities.

International Armed Conflict

Unfortunately, the adaptation of the law of international armed conflict to the changed realities of war has not always been satisfactory. This especially holds true for Article 44(3) of 1977 Additional Protocol I (AP I), which diminishes the obligation of combatants to distinguish themselves from the civilian population.²⁵ That provision does not constitute customary international law and its scope of applicability is limited to situations of “internationalized armed conflicts” in the sense of Article 1(4) of the Protocol.²⁶ However, it certainly provides a degree of protection to members of organized armed groups who intentionally disregard its minimum requirements.²⁷

Apart from that, the law of international armed conflict is rather clear: persons directly participating in the hostilities who qualify neither as combatants nor as members of any of the other privileged groups²⁸ do not enjoy combatant immunity or, when captured by the enemy, prisoner of war status. As far as civilians are concerned, this has been expressly recognized by Article 51(3), AP I: “Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.” Of course, the exact meaning and scope of the concept of direct participation in hostilities is far from settled.²⁹ The same holds true with regard to the legal status of civilians directly participating in hostilities. Some continue to consider them as civilians protected under the Fourth Geneva Convention³⁰ who may, however, be attacked (for such time they are directly participating in hostilities) and punished for their conduct.³¹ Others consider them “unlawful combatants” who are protected by neither the Third Geneva Convention on the treatment of prisoners of war nor the Fourth Geneva Convention.³²

The law of international armed conflict provides a rather elaborate set of rules responding to participatory asymmetry and offers an operable solution to most of the problems encountered in recent international armed conflicts. While there is no prohibition of entrusting persons other than combatants with the commission

of acts harmful to the enemy, those persons not enjoying combatant immunity directly participating in hostilities must understand that they enjoy no protection under the law of armed conflict beyond the minimum standards laid down in Article 75 of AP I and in Common Article 3 of the four 1949 Geneva Conventions.

Accordingly, members of organized armed groups that do not belong to a party to an international armed conflict but who directly participate in hostilities do not pose an insurmountable legal problem. They may either be considered as civilians directly taking part in the hostilities, who, for the duration of their direct participation, are liable to attack and who may be prosecuted after capture, or, alternatively, the organized armed group to which they belong is a party to a non-international armed conflict that exists side by side with the international armed conflict. In the latter instance, the members of such a group—at least if and as long as they perform a “continuous combat function” within the organized armed group³³—are legitimate targets who enjoy neither combatant immunity nor prisoner of war status after capture.

Non-international Armed Conflicts

Non-international armed conflicts are asymmetric by nature, particularly if regular armed forces are engaged in hostilities against organized armed groups of non-State actors. Since, however, the concept of “combatant” does not apply to non-international armed conflicts the applicable law is not built on the legal status of the actors. It is important to note in this context that the very existence of a non-international armed conflict presupposes that there exists at least one organized armed group engaging in armed hostilities against the government or against another organized armed group. Hence, members of an organized armed group do not qualify as civilians. This is widely accepted.³⁴

There is, however, one unresolved issue relating to those members of an organized armed group who do not perform a “continuous combat function.” While some prefer to consider them civilians,³⁵ others are unwilling to differentiate according to an individual’s function within the group.³⁶ The least common denominator is that members of an organized armed group performing a “continuous combat function” in a non-international armed conflict do not enjoy general protection and are liable to attack. Of course, the State party to a non-international armed conflict is not prevented from prosecuting them if captured under its domestic criminal law.

In non-international armed conflict civilians enjoy general protection. They may lose that protection, however, if they deliberately decide to take a direct part in the hostilities. Accordingly, Article 13(3) of the 1977 Additional Protocol II provides: “Civilians shall enjoy the protection afforded by this Part, unless and for

such time as they take a direct part in hostilities.” This is declaratory of customary international law.³⁷

Intentional Violations of the Law

Although not without difficulties, as has been shown, participatory and normative asymmetries can be coped with under the existing law; however, the core of the problem posed by asymmetric warfare is intentional violation of the law of armed conflict by asymmetric actors.

General Aspects

Asymmetric actors in armed conflict either intentionally violate the principle of distinction or endeavor to incite their opponent to act in violation of that “intransgressible principle”³⁸ of the law of armed conflict.

The law of armed conflict provides a rather clear response to any form of asymmetric warfare that aims at blurring the principle of distinction, whether by way of disguising as civilians, by abusing civilian objects for military purposes or by direct attacks against the civilian population or individual civilians. Still, the problems in practice persist. If it is not feasible to identify enemy combatants or members of enemy organized armed groups because they appear to be civilians, a decision not to attack may result either in suicide or, even worse, in *prohibited* direct attacks against the civilian population. Of course, combatants who do not distinguish themselves properly when engaged in hostilities do not enjoy combatant immunity or prisoner of war status when captured. While they may be prosecuted for their conduct, this is considered by many military commanders to be an insufficient response to their practical problems.

Similar problems exist with regard to the principle of proportionality. The law of armed conflict does not prohibit attacks that result in the incidental loss of civilian life, injury to civilians or damage to civilian objects. Such “collateral damage” is a violation of the law of armed conflict only if it is excessive (in contrast to “extensive”) in relation to the concrete and direct military advantage anticipated.³⁹ In view of that prohibition, and in view of the media’s attention to any civilian losses in armed conflict, an asymmetric actor will seek either to provoke the opponent into an attack causing excessive collateral damage or to make the public believe that an attack has been disproportionate. Systematic violations of the principle of distinction entail the considerable risk that the opponent applies different standards for the assessment of proportionality. “If such tactics are systematically employed for a strategic purpose, the enemy may feel a compelling and overriding necessity to attack irrespective of the anticipated civilian casualties and damage.”⁴⁰ Still, the prohibition on excessive collateral damage is clear. Considerations of

military necessity do, of course, play an important part, especially with regard to the determination of the anticipated military advantage. However, military necessity as such does not justify a deviation from the well established humanitarian standards of the law of armed conflict.⁴¹

Moreover, asymmetric actors will in many cases deliberately act contrary to their obligation to take feasible precautions in attack, particularly by using civilians or civilian objects as shields or by transferring military objectives into densely populated areas. Despite the obvious illegality of such conduct, the opponent will be prevented from attack if the attack is expected to result in excessive collateral damage. Here the law of armed conflict itself introduces an element of asymmetry by privileging unlawful conduct.

Finally, a further problem exists with regard to the obligation of the attacker to do everything feasible to limit attacks to lawful targets and to avoid, if possible, and, in any event, to minimize excessive collateral damage.⁴² It would go too far to conclude that parties to a conflict that possess advanced weapons systems are under an absolute obligation to only make use of sophisticated and highly discriminating weapons. The fact that such weaponry is available does not necessarily mean that less sophisticated weapons may no longer be employed. Sophisticated and advanced weapons are expensive and they may, therefore, be reserved for attacks on more important targets. It must be recognized, however, that

advanced militaries are held to a higher standard as a matter of law because more precautions are feasible for them. As the gap between “haves” and “have-nots” widens in 21st century warfare, this normative relativism will grow. In a sense, we are witnessing the birth of a capabilities-based IHL regime.⁴³

The consequence is that to a certain extent the standard of feasibility privileges the weaker side of an armed conflict, thus adding another form of normative asymmetry into the law of armed conflict.

Use of Prohibited Weapons

The law of armed conflict and arms control law, which are increasingly merging into a single regime labeled “humanitarian arms control,” provide a well established set of rules that either prohibit the use of certain weapons or restrict their use in certain circumstances.⁴⁴ In asymmetric warfare the weaker party may be inclined to disregard such prohibitions or restrictions and to justify a deviation by citing the superiority of the opponent.⁴⁵ Moreover, as pointed out by the International Committee of the Red Cross, “it is evident that if one Party, in violation of definite rules, employs weapons or other methods of warfare which give it an

immediate, great military advantage, the adversary may, in its own defence, be induced to retort at once with similar measures.”⁴⁶ Such justifications have, however, no basis in existing law. The fact that a party to an armed conflict is confronted with a superior enemy does not justify the use of a means of warfare whose use is prohibited under the law of international and non-international armed conflict. Therefore, the threat of imminent defeat is not sufficient grounds for resorting to the use of prohibited means of warfare.

Unfortunately, the International Court of Justice in its *Nuclear Weapons* advisory opinion held that the use of nuclear weapons is contrary to the law of armed conflict unless the “very survival of a State is at stake.”⁴⁷ It is obvious that this holding may be improperly used to justify a violation of the rules and principles of the law of armed conflict. It needs to be emphasized, however, that the Court’s finding has no basis in the law of armed conflict. If the survival argument has any relevance, it may be to the *jus ad bellum*.

Prohibited Methods of Warfare

One feature of asymmetric warfare is suicide bombings; another is the use of “human shields.” With regard to the former, it is important to note that the law of armed conflict does not prohibit suicide attacks unless they are conducted by resort to perfidious means and/or methods.⁴⁸

The law is different with regard to the use of human shields. Article 51(7) of AP I, in prohibiting the use of the “presence or movements of the civilian population or individual civilians . . . to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favor or impede military operations,” reflects customary international law.⁴⁹ The law of armed conflict provides a possible—though not undisputed—solution to cope with the issue of human shields by distinguishing between voluntary and involuntary human shields.

Civilians, whatever their motives, who voluntarily serve as human shields may be considered as taking a direct part in hostilities for the duration of such participation, thereby losing their protected status under the law of armed conflict.⁵⁰ Despite arguments to the contrary, involuntary human shields retain their status as civilians.⁵¹ Accordingly, attacks against a shielded military objective will be prohibited if the incidental losses among involuntary human shields are excessive in relation to the concrete and direct military advantage anticipated.⁵² It needs to be emphasized in this context that

the appraisal of whether civilian casualties are excessive in relation to the military advantage anticipated must make allowances for the fact that, by dint of the large (albeit

involuntary) presence of civilians at the site of the military objective, the number of civilian casualties can be expected to be higher than usual.⁵³

However, the distinction between involuntary and voluntary human shields will, in many cases, not provide an operable solution in practice because it is virtually impossible to determine whether a person has deliberately and freely decided to serve as a human shield or is being forced to so act.

Moreover, while the law of armed conflict may not prohibit a proportionate attack against a shielded lawful target, it will prove a most difficult task to defend the death of a considerable number of civilians politically. In asymmetric warfare, the weaker party often consciously and systematically turns to the practice of using human shields in order to exploit the political and moral dilemma in which the attacker will find itself. Thus, while the law purports to offer a solution, in most instances it will not assist in overcoming those dilemmas.

Preliminary Conclusions

Doubts have been expressed as to whether asymmetric warfare can “still be grasped by and measured against the concept of military necessity, for the complexities and intangibility of such scenarios escape its traditionally narrow delimitations.”⁵⁴ These doubts particularly extend to responses to the actions of non-State actors who intentionally and systematically deviate from well established standards of the law of armed conflict. Their opponents may be induced to reemphasize considerations of military necessity that may result either in a more liberal interpretation of the law of armed conflict or in its irrelevance because it is considered an unfair obstacle to the success of military operations.

Of course, reciprocity is an important factor in maintaining the continued effectiveness of the law of armed conflict. If one party to an armed conflict intentionally and systematically disregards its rules and principles in order to achieve a military or political advantage, the opponent's readiness to continue to comply with the law may steadily decrease. There are, however, solutions to the problem. On the one hand, the law of armed conflict is flexible enough to respond to an asymmetric actor's conduct. While it is true that such responses put a heavier burden on the law-abiding party to the conflict, the values underlying the law of armed conflict and the achievements of the past 150 years should not be given up too easily. While it is conceded that the growing asymmetries in warfare have the potential of shaking the very bases of the law of armed conflict, this does not mean that there is a need for an adaptation of the law to the “new realities” of armed conflict.

III. Possible Responses to Asymmetric Warfare

Although it must be admitted that complying with the law has become increasingly difficult, the law of armed conflict provides solutions to the threats posed by the current versions of asymmetric warfare. Moreover, the emergence of international criminal law has added a further and quite powerful enforcement mechanism for ensuring compliance with the law of armed conflict. It may be questioned, however, whether non-State actors will understand that, despite their inferiority in arms and military technology, they would ultimately profit from compliance with the law of armed conflict. If intentional violations of the law are part and parcel of an overall strategy, it would be quite naïve to believe that asymmetric actors would be deterred from such violations by either lawful responses or criminal proceedings.

For that reason, it is also doubtful whether “incentives” to non-State actors would ultimately result in compliance with the law of armed conflict. Proposed amnesties, reconciliation procedures, truth commissions and similar measures have not necessarily proven to contribute to an increased effectiveness of the law of armed conflict during active hostilities. In certain circumstances they may serve as an operable tool to reestablish peace and security in post-armed conflict societies. As reality shows, however, such steps have not prevented egregious atrocities from occurring during armed conflicts. Additionally, the law of armed conflict is far too important to be sacrificed on the altar of political expediency. Any form of impunity would run counter to the very object and purpose of the law of armed conflict—and of international criminal law.

Once faced with the challenge of responding to asymmetric warfare, States must be prepared to invoke the law of armed conflict in two respects.

The first is strict application of the law vis-à-vis asymmetric actors. This includes, but is not limited to, treating them as combatants. For instance, some States respond to asymmetric threats by resorting to “targeted killings” (also labeled “extrajudicial killings”) of individuals suspected of being involved in unlawful attacks against government forces, civilians or civilian objects. It must be borne in mind that under the law of armed conflict there is no general prohibition of targeted killings. If the targeted individual qualifies as a combatant, including as a member of an organized armed group who is “performing a continuous combat function,” or as a civilian directly participating in hostilities, he or she may be attacked. There is, however, disagreement whether there is an obligation to rather capture than kill the individual if that is a feasible alternative.⁵⁵ Of course, the political price to be paid is frequently considered to be too high, creating an unwillingness on the part of many governments to consent (or resort) to targeted killings.

Second and closely related to the first aspect, governments should be proactive in explaining to the general public and to all concerned political actors their understandings of the law of armed conflict, both in general and in its application to a given concrete situation. It is therefore important to have an up-to-date military manual that reflects the current state of the law of armed conflict as it is understood by the government. Given the adoption of new treaties, developments in customary international law and new interpretations of existing treaties, it is not sufficient to simply publish a manual once; it must be updated to reflect changes in the law. For instance, the manual of the German armed forces was published in 1992⁵⁶—nearly two decades ago. Because it does not provide answers to legal questions arising, for instance, in the context of the conflict in Afghanistan, it has become increasingly difficult to identify the German government's position on the current state of the law of armed conflict. Consequently, it is rather easy for certain actors pursuing a political agenda to claim that the German armed forces operating in Afghanistan have violated the law.

In this context, it must not be forgotten that one feature of asymmetric warfare is the use—or rather abuse—of the media and of public opinion. It is therefore crucial to provide prompt and reliable information. The German armed forces, after an attack on Taliban fighters and two tanker trucks in September 2009, had to learn in a quite painful manner that a time-consuming and unstructured investigation will fuel further speculation as to what actually occurred and will only assist the enemy, either directly or indirectly.

The air attack on the trucks and the Taliban fighters who were in the immediate vicinity was conducted in accordance with the law of armed conflict. The fighters were lawful targets because they were members of an organized armed group performing a “continuous combat function.” Because there were reasonable grounds for assuming that the trucks—and the fuel they carried—would be used for attacks against civilians and International Security Assistance Force personnel, they had become lawful military objectives by either their use or intended purpose. At the time of the decision to attack the trucks and the Taliban fighters, the commanding officer rightly relied on the information available to him.

The reconnaissance photographs showed about 70 individuals attempted to free one of the trucks that had become stuck in a river. According to a human intelligence source who had been very reliable in the past, the people surrounding the trucks were Taliban fighters. Recognizing his obligations under the law of armed conflict, the German officer who authorized the attack decided to only use two five-hundred-pound bombs in order to spare a nearby farm and village. Shortly after the attack it was reported in some media reports that as many as 142 people had been killed. In these initial reports, the statuses of the people allegedly killed or

injured was uncertain; some spoke of “Taliban and civilians,” others of “predominantly civilian casualties.” Other reports stated that the majority of civilians killed or injured were innocent persons from the nearby village who were only trying to acquire fuel for their personal needs.

On April 16, 2010, the Office of the Public Prosecutor decided to dismiss all criminal proceedings against the German officers involved. The report on which that decision was based reveals that at the time of the attack there had been reasonable grounds to assume that the individuals surrounding the trucks were Taliban. While the public prosecutor could not rule out the presence of civilians, the report indicated that if some were civilians, at least some of those had directly participated in the hostilities. In any event, there was no convincing evidence of a large number of civilian casualties. Even if there had been civilian casualties, the report continues, there would be no violation of the law of armed conflict because the incidental losses and injuries were not excessive in relation to the military advantage anticipated. Unfortunately, the report was classified because it contained sensitive military information. It was not until October 2010 that an unclassified version was made available to the public. By that time public opinion had already been influenced by unfounded allegations of violations of the law of armed conflict. The general perception has not been altered since the release of the report because neither the Office of the Public Prosecutor nor the Federal Ministry of Defence has proactively disseminated it.

It is, of course, understood that thorough investigations are important in order to be credible and in order to protect the members of the armed forces allegedly involved in a violation of the law of armed conflict. Still, the media field should not be left to those who, in disregard of their lack of information (and all too often expertise), pursue their political ends by claiming violations of the law. A delayed government response will often be considered as evidence of secrecy.

History has shown that reports of national authorities entrusted with the investigation of alleged violations of the law of armed conflict by their own forces will in many instances be received with suspicion; therefore States engaged in military operations should be prepared to entrust investigations to an independent fact-finding entity whose functions are to conduct a thorough investigation and provide reliable and trustworthy information to government decisionmakers and the public. In that regard, governments, whether Additional Protocol I formally applies or not, should be encouraged to make use of the fact-finding commission under Article 90, AP I, or, alternatively, agree on another investigatory body composed of members of high political reputation.

Conclusion

Asymmetric warfare clearly constitutes a challenge to the international legal order and to its underlying values. While it does not justify a deviation from the well established rules and principles of the law of armed conflict, it is necessary to strengthen that law by all means available. Because asymmetric actors will not abandon the options opened by a deliberate violation of the law of armed conflict, incentives to non-State actors to bring about compliance will very often prove futile. Despite the potential political implications, the application of military force *in accordance with the law of armed conflict* is the first way to respond to the threats posed by asymmetric warfare. This, however, must be accompanied by a proactive and credible information policy. Additionally, thorough investigation/fact-finding by a neutral and respected international commission of the actions of the non-State actors would be an effective step that could contribute to repressing such conduct.

A further step is criminal prosecution, under either domestic or international criminal law, of those who violate the law. While some may object, often citing the frequently heard cliché that “one man’s terrorist is another man’s freedom fighter,” holding accountable those who violate the law is the only promising approach to deterring those who choose to violate the law. Amnesties or reconciliation efforts may have proven successful in limited instances; it is doubtful, however, whether they have had—or will have—a lasting effect. Rather, they may prove to be an incentive for asymmetric actors to continue to pursue or even increase their unlawful conduct.

These conclusions do not, however, relieve States from their obligation vis-à-vis their armed forces to clarify the applicable law for situations not amounting to an international or non-international armed conflict. Moreover, governments ought to thoroughly scrutinize and evaluate the challenges posed by asymmetric warfare and take the necessary measures to reduce their vulnerabilities. Vulnerabilities—whatever their nature—will always be an interesting target for asymmetric actors, whether they are enemy States or non-State actors, e.g., terrorists.

Notes

1. See, e.g., YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 27 (2d ed. 2010).

2. Cf. Tullio Treves, *Piracy, Law of the Sea, and the Use of Force: Developments off the Coast of Somalia*, 20 *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 399 (2009); Wolff Heintschel von Heinegg, *Repressing Piracy and Armed Robbery at Sea – Towards a New Legal Regime?*, 40 *ISRAEL YEARBOOK ON HUMAN RIGHTS* 219 (2010).

3. See, e.g., Douglas Guilfoyle, *Counter-Piracy Law Enforcement and Human Rights*, 59 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 141, 152 *et seq.* (2010).
4. Cf. Christian J. Tams, *The Use of Force against Terrorists*, 20 EUROPEAN JOURNAL OF INTERNATIONAL LAW 359 (2009); Claus Kreß, *Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts*, 15 JOURNAL OF CONFLICT AND SECURITY LAW 245, 248 *et seq.* (2010).
5. THAZA V. PAUL, ASYMMETRIC CONFLICTS: WAR INITIATION BY WEAKER POWERS 20 (1994).
6. Kenneth E. McKenzie Jr., *What Is Asymmetric Warfare?*, in THE REVENGE OF THE MELIANS: ASYMMETRIC THREATS AND THE NEXT QDR 2 (2000), available at <http://www.au.af.mil/au/awc/awcgate/ndu/mcnair62.pdf>.
7. Toni Pfanner, *Asymmetrical Warfare from the Perspective of Humanitarian Law and Humanitarian Action* INTERNATIONAL REVIEW OF THE RED CROSS 149, 151 (2005).
8. Michael N. Schmitt, *Asymmetrical Warfare and International Humanitarian Law*, in INTERNATIONAL HUMANITARIAN LAW FACING NEW CHALLENGES 11, 16 (Wolff Heintschel von Heinegg et al. eds., 2007).
9. On the element of surprise, see CARL VON CLAUSEWITZ, ON WAR 198–201 (Michael Howard & Peter Paret trans. and eds., Princeton Univ. Press 1984) (1832); on ruses, see *id.* at 202–3.
10. See DINSTEIN, *supra* note 1, at 4 *et seq.*
11. Herfried Münkler, *The Wars of the 21st Century*, 85 INTERNATIONAL REVIEW OF THE RED CROSS 7, 20 (2003).
12. Pfanner, *supra* note 7, at 153.
13. See Wolff Heintschel von Heinegg, *The International Legal Framework of Submarine Operations*, 39 ISRAEL YEARBOOK ON HUMAN RIGHTS 331, 340 *et seq.* (2009).
14. In this regard, consider the Convention on Cluster Munitions, Dec. 3, 2008, 48 INTERNATIONAL LEGAL MATERIALS 357 (2008), or the Ottawa Convention on Anti-Personnel Mines (Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 2056 U.N.T.S. 211).
15. For an analysis of lawfare, see Charles J. Dunlap Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts* (Carr Center for Human Rights, John F. Kennedy School of Government, Harvard University, Working Paper, 2001), available at <http://www.ksg.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf>.
16. St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Nov. 29–Dec. 11, 1868, reprinted in 1 AMERICAN JOURNAL OF INTERNATIONAL LAW 95 (Supp. 1907).
17. Under the law of international armed conflict, there is no prohibition of employing other than combatants; however, the privileges (prisoner of war status and combatant immunity) are reserved to combatants proper.
18. Cf. DINSTEIN, *supra* note 1, at 3.
19. The Secretary-General, Bulletin on the Observance by United Nations Forces of International Humanitarian Law §1.1, U.N. Doc. ST/SGB/1999/13 (Aug. 6, 1999).
20. Daniel Thürer, *Der Kosovo-Konflikt im Lichte des Völkerrechts: Von drei – echten und scheinbaren – Dilemmata*, 38 ARCHIV DES VÖLKERRECHTS 1, 11 (2000).
21. See Christopher Greenwood, *The Applicability of International Humanitarian Law and the Law of Neutrality to the Kosovo Campaign*, in LEGAL AND ETHICAL LESSONS OF NATO'S

KOSOVO CAMPAIGN 35 (Andru E. Wall ed., 2002) (Vol. 78, U.S. Naval War College International Law Studies).

22. See, e.g., Convention No. IV Respecting the Laws and Customs of War on Land art. 6, Oct. 18, 1907, 36 Stat. 2227 [hereinafter Hague Convention No. IV]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 96(2), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

23. This has also been recognized in PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, COMMENTARY ON THE HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE Rules 161–64 (2009) [hereinafter COMMENTARY ON THE HPCR MANUAL].

24. Pfanner, *supra* note 7, at 153.

25. See Yves Sandoz, *Article 44 – Combatants and prisoners of war*, in COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶¶ 1697–1724 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987).

26. Knut Ipsen, *Combatants and Non-Combatants*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 79, 89 *et seq.* (Dieter Fleck ed., 2d ed. 2008).

27. Stefan Oeter, *Comment: Is the Principle of Distinction Outdated?*, in INTERNATIONAL HUMANITARIAN LAW FACING NEW CHALLENGES, *supra* note 8, at 53, 59 *et seq.*

28. See Regulations Respecting the Laws and Customs of War on Land, annexed to Hague Convention No. IV, *supra* note 22, art. 1; Convention Relative to the Treatment of Prisoners of War art. 4A(1)–(3), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

29. See NILS MELZER, INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 41–64 (2009), available at http://www.icrc.org/eng/assets/files/other/icrc_002_0990.pdf [hereinafter INTERPRETATIVE GUIDANCE]; Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHICAGO JOURNAL OF INTERNATIONAL LAW 511 (2004–2005); DINSTEIN, *supra* note 1, at 146 *et seq.*; COMMENTARY ON THE HPCR MANUAL, *supra* note 23, sec. F.

30. Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC-IV].

31. INTERPRETATIVE GUIDANCE, *supra* note 29, at 65–68.

32. Yoram Dinstein, *The System of Status Groups in International Humanitarian Law*, in INTERNATIONAL HUMANITARIAN LAW FACING NEW CHALLENGES, *supra* note 8, at 145, 149.

33. INTERPRETATIVE GUIDANCE, *supra* note 29, at 33–36.

34. See, e.g., MICHAEL N. SCHMITT, CHARLES H.B. GARRAWAY & YORAM DINSTEIN, THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT WITH COMMENTARY ¶ 1.1.2 (2006), reprinted in 36 ISRAEL YEARBOOK ON HUMAN RIGHTS (2006) (Special Supplement).

35. INTERPRETATIVE GUIDANCE, *supra* note 29, at 20–26.

36. For that and other reasons, a number of experts who had participated in the process withdrew their names from the list of experts.

37. See COMMENTARY ON THE HPCR MANUAL, *supra* note 23, at 117.

38. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 79 (July 8) [hereinafter Nuclear Weapons Advisory Opinion].

39. Additional Protocol I, *supra* note 22, art. 51(5)(b).

40. Robin Geiß, *Asymmetric Conflict Structures*, 88 INTERNATIONAL REVIEW OF THE RED CROSS 757, 766 (2006).

41. A.P.V. ROGERS, LAW ON THE BATTLEFIELD 4 (2d ed. 2004).

42. Additional Protocol I, *supra* note 22, art. 57(2).
43. Schmitt, *supra* note 8, at 42.
44. For an in-depth analysis, see WILLIAM H. BOOTHBY, *WEAPONS AND THE LAW OF ARMED CONFLICT* 41 *et seq.* (2009).
45. Geiß, *supra* note 40, at 758.
46. INTERNATIONAL COMMITTEE OF THE RED CROSS, *REAFFIRMATION AND DEVELOPMENT OF THE LAWS AND CUSTOMS APPLICABLE IN ARMED CONFLICTS* 83 (1969).
47. Nuclear Weapons Advisory Opinion, *supra* note 38, ¶ 97.
48. Schmitt, *supra* note 8, at 32.
49. *See also* GC-IV, *supra* note 30, art. 28 (“The presence of a protected person may not be used to render certain points or areas immune from military operations”).
50. *See* DINSTEIN, *supra* note 1, at 153.
51. Schmitt, *supra* note 8, at 27.
52. Additional Protocol I, *supra* note 22, art. 51(5)(b).
53. DINSTEIN, *supra* note 1, at 155.
54. Geiß, *supra* note 40, at 770.
55. *See* INTERPRETATIVE GUIDANCE, *supra* note 29, at 77–82. *See also* NILS MELZER, *TARGETED KILLING IN INTERNATIONAL LAW* 394 *et seq.* (2008).
56. FEDERAL MINISTRY OF DEFENCE (Germany), *HUMANITARIAN LAW IN ARMED CONFLICTS MANUAL* (1992).

PART IX

CLOSING ADDRESS

XVIII

Concluding Remarks: LOAC and Attempts to Abuse or Subvert It

Yoram Dinstein*

This has been another intellectually stimulating conference. By now, there is a high level of expectations as regards each and every Newport conference. The series of annual gatherings has become *de rigueur* for any serious military lawyer or academic specializing in the *jus ad bellum*, the *jus in bello* or the law of the sea. The topics explored in the Newport conferences vary from one year to another. A decade ago, all eyes were focused on the air campaign in Kosovo. After 9/11, the “war on terrorism” and its innumerable corollaries loomed large. Then came the hostilities in Afghanistan and Iraq, and their aftermath. But, while no two Newport conferences are alike, “it’s the same always different.” What is the same is the road that we are all traveling on together. What is different—over a stretch of time—pertains to the particular bumps on that road, the new detours caused by fallen rocks and construction in progress, not to mention the need to constantly watch out for slippery conditions.

As a “recidivist” concluding speaker in the Newport conferences, I usually choose a number of diverse themes emerging from the exchanges of views to dwell on. This time, allow me to concentrate on a single (albeit two-pronged) topic. To me, there is a troubling aspect of the presentations and the deliberations that I notice (and not for the first time). This relates, as it were, not to the music but to the

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tone: not the presentations or interventions in debates by themselves, but the manner in which they are made. I am rather taken aback by the fact that, when military lawyers who practice the law of armed conflict (LOAC) take the floor, they invariably sound on the defensive. Defensive about what and why?

The answer, first and foremost, is that we have to defend our shared societal values against the barbarians who are pushing in at the gates of civilization. Of course, there have always been barbarians exerting force at the gates of civilization. The Roman Empire held off the hordes of the ancient barbarians for many centuries. But one must never feel complacent. After all, in time, the relentless pressure of the ancient barbarians did overwhelm the Roman Empire. If we want to ensure that our own defenses are not breached by the modern barbarians (i.e., rogue States and organized armed groups of non-State actors whose *modus operandi* is terrorism), we must vigilantly verify that they are maintained in good shape.

It is necessary to take into account that in modern times the onslaught of the barbarians has become more insidious because they have adopted lawfare as one of the most effective weapons wielded against us. “Lawfare” is an expression popularized in the last decade by Charlie Dunlap (who is here with us). Lawfare is to be understood as a means of warfare, and indeed as a countermeasure against military reverses. Since the modern barbarians are unable to win discrete battles against the technologically superior armed forces arrayed against them, they try to win the war by using lawfare. What the barbarians do is use—and generally abuse—legal arguments to foil any military success that may be scored by the armed forces of civilized nations.

The notion of winning war by lawfare may appear to be far-fetched. Yet, we must not underrate the potency of lawfare as a weapon of mass destruction—in this case, a weapon of mass disinformation—attuned to the peculiarities of the era in which we live. Allegations of breaches of LOAC by our troops (usually magnified in propaganda to the scale of “atrocities”) tend to drive a wedge between our military community and the civil society. When the public perception is that “atrocities” have been perpetrated by our troops, no victory in the field can repair the psychological damage done to the cause for which we are fighting.

The Vietnam conflict has shown that a civilized country such as the United States can win military battles, yet lose a war only because public opinion at home turns against it. Post-Vietnam, it is folly to lose sight of mood swings in public opinion: polls indicating opposition to a war may determine its political outcome (which is the only outcome that counts in the final analysis) no less—perhaps even more—than actual defeats sustained in military encounters.

Lawfare was not a major consideration at the time of Vietnam, but it has become so today. This is a new development that has come about at or around the dawn of

the twenty-first century. Whatever its precise origins, the new element brought into play is that legal arguments can be effectively canvassed to corrode the indispensable home-front support for a given war. This is done by condemning as unlawful the means and methods of warfare resorted to by our troops. In particular, lawfare seems to strike the right chord with the public when it hammers skillfully on the sensitive issue of civilian losses (and damage to civilian objects) incidental to attacks executed by our armed forces against lawful enemy targets. The subject is encapsulated in the commonly used phrase “collateral damage.”

The most fascinating dimension of lawfare, as practiced against us today, is the profound irony of the entire situation. On one side, you have the modern barbarians who are conducting hostilities in an utterly lawless fashion: not only do they ignore LOAC; they trample it underfoot. Specifically, the barbarians do not hesitate to kill civilians (including a sacrifice of their own civilians) on a large scale. In fact, they slaughter civilians on a large scale recklessly and even in a premeditated fashion.

On the other side, you have civilized nations. Generally speaking, civilized nations abide by LOAC. They do so notwithstanding the complications resulting from the diametrically opposite conduct of the enemy. Indeed, despite many temptations, LOAC has not been relaxed to allow civilized nations more elbow room when confronting the barbarians. If anything, in the last few decades LOAC—as accepted and practiced by civilized nations—has become more rigorous than ever.

It goes almost without saying that instances of breaches of LOAC do occur even where civilized armed forces are concerned. However, (i) relatively speaking, these instances are few and far between (although they are usually well-publicized in the media); and (ii) there is in place a highly developed military justice system that is entrusted with the strict enforcement of LOAC and the winnowing out of offenders (many participants in the present conference represent that system). We also spend enormous human and financial resources in disseminating LOAC and instilling its directives into the troops through constant training at all command levels.

The long and the short of it is that the civilized armed forces—on the whole—have a laudable record of implementation of LOAC, whereas the barbarians have an appalling one. This is where the true “asymmetry of warfare” is manifested in modern times. But here is the puzzling aspect of that asymmetry. One would have expected that the civilized side would go on the legal offensive, charging the enemy with recourse to methods of barbarism that contravene every cardinal principle of LOAC. Instead, while we keep relatively silent, the barbarians mount a legal offensive against us through lawfare. Unfazed by their own show of open disdain for

LOAC, they dare to accuse us of contravening it. They behave as free riders, and yet they literally get away with murder—indeed, mass murder of civilians.

How do we respond? Not with the outrage that might have been expected. The prevailing tone in the present conference—as in similar gatherings—has been defensive and even apologetic. It appears that the barbarians have managed to get under our skin, and we suffer from irrational pangs of a guilty conscience. As a consequence, command echelons on our side often bend over backward in the application of LOAC. What has come to light in the course of the conference is that, in Afghanistan, airstrikes essential to mission accomplishment—and legally unimpeachable—have been scrapped, so as to avoid altogether lawful collateral damage to civilians. We have also heard about the Israeli army resorting to the baffling practice of issuing, prior to attacks against lawful targets, many thousands of individual warnings to enemy civilians on their cellular phones. Just think of the logistical effort invested, undertaken without any legal rhyme or reason, in such an operation.

As we have repeatedly been told in the present conference, “this is not about them, it’s about us.” But what does our odd defensive behavior truly show about us? If we sound as if we were in the wrong in circumstances where we are actually in the right, this is not due to any intrinsic societal values. It is due to an uncalled-for guilt complex, based on a specious sense that perhaps our technological superiority has led us to conduct hostilities in a manner that is incompatible with LOAC.

In reality, technological superiority (epitomized by precision-guided munitions, unmanned aerial vehicles (UAVs) and a host of other sophisticated tools of warfare) has led civilized armed forces to pay greater—rather than lesser—attention to the detailed constraints of LOAC. Attacks are now more surgical than in the past, information about what is going on “on the other side of the hill” is increasingly collated in real time, and so forth. Yet, we are simply not giving ourselves a break. One can sincerely say that “we have met the enemy and it is us.” As far as I am concerned, the moral of the story is that we should undergo some sort of mental therapy. Otherwise, civilization may not outlast the modern barbarians.

I would like to address the central theme of lawfare: *viz.*, enemy civilian losses. Civilized nations adhere tenaciously to the cardinal LOAC principle of distinction between combatants and civilians. What this principle denotes is that every feasible precaution must be taken in wartime to ensure that innocent enemy civilians will be spared from injury by exempting them from attack. I use the phrase “innocent civilians” in order to distinguish genuine civilians from those who masquerade as civilians but take a direct part in hostilities, thereby losing the exemption from attack for such time as they are doing so (a stretch of time which is quite controversial in its length as the oral discussion in the present conference has demonstrated).

The exemption from attack embraces also civilian objects, namely, all objects that are not military objectives (as defined negatively in Article 52 of 1977 Additional Protocol I to the Geneva Conventions).¹

By following the principle of distinction in the course of hostilities, civilized belligerent parties, in principle, kill enemy civilians—or destroy civilian objects—only when the losses (to human beings) or damage (to property) constitute collateral damage. Admittedly, human errors and technical malfunctions do occur occasionally. But, otherwise, solely lawful targets are selected for attack. Nevertheless, civilians—and civilian objects—are inevitably subject to harm when present or located in or around these targets, because this is deemed collateral damage.

It is frequently glossed over (especially in the media) that LOAC takes some collateral damage to enemy civilians virtually for granted as an inescapable consequence of attacks against lawful targets. Such damage is the case owing to the simple fact that lawful targets cannot be sterilized: some civilians and civilian objects will almost always be in proximity to combatants and military objectives. Hence, a modicum of collateral damage to civilians cannot possibly be avoided unless a battle rages in the middle of the ocean or the desert (where no civilians or civilian objects are within range of the contact zone in which the belligerent parties are conducting attacks against each other).

Far from imposing an all-embracing prohibition on collateral damage to enemy civilians and civilian objects, LOAC expressly permits it as long as (in the words of Additional Protocol I) it is not expected to be “excessive,” compared to the military advantage anticipated.² This is the core of the principle of proportionality (the word “proportionality” itself is not mentioned as such in the Protocol). And “excessive”—we have to keep reminding ourselves—is not synonymous with “extensive.”³ Extensive civilian casualties (and damage to civilian objects), even when plainly expected, may be perfectly lawful when reasonably determined to be non-excessive (on the basis of the information at hand at the time of action) once weighed against the military advantage anticipated.⁴

The study of these expectations and anticipations is not an exact science, and much depends on the perceived “value” of the military objective targeted in the circumstances prevailing at the time. There are numerous question marks that remain unresolved in the implementation of the principle of proportionality. Yet, the principle itself is not contested by any civilized member of the international community.

Of course, war is hell. LOAC has not undertaken a mission impossible of purporting to eliminate the hellish consequences of war. What LOAC basically strives to do is reduce these consequences. To reiterate the language of the 1868 St. Petersburg Declaration (one of the very first LOAC treaties on record), what

LOAC strives at is “alleviating as much as possible the calamities of war.”⁵ Collateral damage to civilians and civilian objects, too—when it cannot be avoided altogether—has to be minimized in accordance with the principle of proportionality.

Not everybody likes the down-to-earth attitude that LOAC takes vis-à-vis warfare. Indeed, in recent years, a new major problem has arisen. The clear and present danger of the barbarians in front remains unabated. But, in the meantime, another menace has evolved in the back. This menace comes from the human rights zealots and do-goodniks, whom I shall call “human rights-niks” for short. Far be it from me to suggest that every human rights scholar or activist necessarily comes under this rubric. In fact, we have in our midst some genuine scholars in the arena of human rights (preeminently, Françoise Hampson) for whom I have the greatest respect. But all too often today we encounter the unpleasant phenomenon of human rights-niks who, hoisting the banner of human rights law, are attempting to bring about a hostile takeover of LOAC. This is an encroachment that we must stoutly resist.

The human rights-niks in the back are by no means to be confused with the barbarians in front: far from endorsing methods of barbarism, the human rights-niks would prefer a non-violent solution to every conflict. Nevertheless, the danger that the human rights-niks pose is equally acute, since they threaten to pull the legal rug from under our feet. They thus aid and abet the lawfare of the enemy by leaving the civil society with the impression that we are acting (or reacting) in a manner that is incompatible with the loftier aspirations of the law.

Inter alia, human rights-niks would like to revolutionize the field by introducing a normative system of warfare characterized by zero collateral damage to civilians. To accomplish that, they would like to disallow attacks against lawful military targets, if these entail some collateral damage to civilians or civilian objects. Since (as indicated) such collateral damage is bound to happen, this would imply the banning of almost all attacks against enemy combatants and military objectives.

The legal revolution that human rights-niks wish to engender relates to the broad spectrum of norms that govern the conduct of hostilities. Human rights-niks tacitly accuse us of applying the wrong legal system by following LOAC instead of human rights law. They would like to see human rights law applicable in wartime as much as in peacetime: not side by side with, but in lieu of, LOAC. This kind of approach often resonates with the lay (and basically uninformed) public at large, if only because lots of people cannot tell “human” apart from “humanitarian” when LOAC is referred to (as it recurrently is) as “international humanitarian law.” After all, it is the humanitarian impulse that propels both human rights law and international humanitarian law (aka LOAC).

The trouble is that, if we were to do what the human rights-niks want us to do, hostilities would become impracticable. That is to say, all forms of warfare would be beyond the pale. Many human rights-niks do not hide that this is what they truly—and ultimately—want. They are animated by genuine motives of pacifism (echoed even in one of the questions posed during the questions-and-answers time in our own conference), and they believe that LOAC stands in their way. What they fail to grasp is that, while war may be nobly wished away, it is not a phenomenon that is likely to disappear as long as there are barbarians who force it on the civilized world. And it is impossible to fight a war if we are not ready to shed blood. LOAC is doing what it can to ensure that bloodletting is confined to combatants, leaving innocent civilians out of the circle of fire. Still, zero collateral damage to civilians (or civilian objects) is not a hardheaded scenario in war, and LOAC recognizes that naked truth.

When the position is examined objectively, it becomes obvious that LOAC is the only effective dike against “total war.” Without LOAC, civilian casualties in war-time will not be reduced: they will escalate. If human rights law were to replace LOAC—if no feasible options of conducting hostilities were left to belligerent parties in war—ultimately no rules would survive, inasmuch as the legal paper-constraints would simply be ignored by the clashing armies. Therefore, the genuine option that must be exercised is not between LOAC (characterized by pragmatism and common sense) and human rights law (untainted in its pristine purity). It is between LOAC and lawlessness. And just as we strenuously reject lawlessness as practiced by the barbarians, we must not allow lawlessness to be inflicted on our own side out of a misguided belief in some notional primacy—in the wrong context—of human rights precepts.

Many people think that the best solution to the problem is a compromise of sorts, reflected in the dual application of both LOAC and human rights law (side by side with one another) in an armed conflict. This may sound ideal, except that, for several reasons, such duality is neither necessary nor even possible in multiple contexts.

The first plank of the argument is that, empirically, LOAC has withstood the test of time. LOAC has progressed for a long period of time: much longer than human rights law (which is a product of the post-World War II era). The evolution of LOAC is a product of close cooperation among military personnel, lawyers and diplomats. The whole system is generated and shaped by the special demands of armed conflict, and is predicated on a calibrated balancing act between the requirements of military necessity and humanitarian considerations. Largely speaking, only human rights-niks believe that LOAC has proved unequal to its task.

Interestingly enough, the human rights-niks object even to Additional Protocol I—an instrument adopted in 1977 through the pressure of developing countries—which (although binding on most countries in the world) is not accepted as such by the United States and quite a few other countries. Even the United States regards some provisions of the Protocol (including those cited by me here) as declaratory of existing customary international law. But there is a “Great Schism” (as I like to call it) regarding the status of a host of other stipulations of the Protocol. All the same, even detractors of diverse portions of the Protocol will not contend that it has crossed the red line from LOAC into human rights law.

The second plank of the argument is that the dissonance between LOAC and human rights law is not categorical. Some relevant legal norms of LOAC and human rights law are actually identical (see the example of torture in the next paragraph). But, where differences and variations exist, that does not necessarily mean that human rights law is more “advanced.” It must not be overlooked that most human rights are subject to built-in limitations (such as national security),⁶ and—above all—to outright derogations in wartime.⁷ By contrast, LOAC—crafted specifically by and for the challenges of wartime—is not subject to any similar limitations or derogations.

For sure, there are some exceptional human rights which are non-derogable.⁸ But, if you take the leading example—to wit, the prohibition of torture—you find that, not coincidentally, the very same prohibition constitutes an integral part of LOAC.⁹ So why do we need human rights law?

The third plank of the argument is that, even from a humanitarian perspective, LOAC must not be automatically categorized as inferior to human rights law. Certain norms of LOAC are more stringent than the parallel rules existing in the domain of human rights law in peacetime. To cite the two most obvious illustrations:

- (a) The use of riot control agents (primarily, tear gas) as a method of warfare is banned by the 1993 Chemical Weapons Convention, yet is expressly permitted for law enforcement purposes.¹⁰ The concern underlying this rule is not to loosen the core prohibition of the employment of chemicals (gas warfare) in battle.¹¹ However, the result is clear: non-lethal chemical agents can be part of the arsenal when quelling riots, although not in combat.
- (b) The employment of expanding soft-nosed bullets is forbidden pursuant to LOAC (on the ground that they cause unnecessary suffering),¹² but—due to their greater stopping power—they have become almost standard issue to anti-terrorist special law enforcement units in peacetime.

When all is said and done, I do not deny that human rights law has a role to play in armed conflict. First, there is a natural complementarity of the two branches of international law in non-international armed conflicts (both in light of the special circumstances of a “civil war” and by dint of the historical fact that the applicability of LOAC in such conducts is a fairly recent occurrence and there are still significant gaps in the law). Second, even in inter-State armed conflicts, LOAC is sometimes silent (a leading example is the issue of the summary trial and possibly execution of deserters).¹³ I think that whenever there is a lacuna in LOAC (in the setting of either an international or non-international armed conflict), it must be filled by human rights law.

Still, the thrust of the matter is that where LOAC is not silent—and when there is no correspondence between LOAC and human rights law—there is no way out of having to choose between the two. In such situations, the rule is straightforward: LOAC prevails over human rights law as the *lex specialis* in armed conflict.¹⁴ This central principle has been acknowledged more than once by the International Court of Justice.¹⁵ It is the incontrovertible *lex lata* today.

Human rights-niks are plainly not happy about this state of affairs. What they would like to do is change the law by moving the signposts. There are many indications of such attempts. None is more invidious than the allegation that we have heard here about targeted killing of enemy combatants by drones (i.e., UAVs) amounting to “extrajudicial killings.”

Personally, I find this allegation ludicrous. What death inflicted on enemy combatants in wartime does not amount to an “extrajudicial killing”? Apparently, in their pipe dream, some human rights-niks replace the battlefield by an imaginary courtroom scenario in which enemy soldiers are charged with the commission of crimes (although it is not clear what these crimes are, considering that the mere participating in battle in wartime is not a crime *per se*). In this fictitious courtroom, individual soldiers are apparently summoned to face charges and undergo judicial proceedings with due process guaranteed. If capital punishment ensues, the killing ceases to be “extrajudicial.” Criminal prosecution, conviction and punishment (even the death penalty) thus replace the prosecution of hostilities by military formations on the ground, at sea or in the air.

Well, in the real world (as distinct from the dreamworld of human rights-niks), armed clashes in wartime occur not in a chimerical courtroom but in battle: any exchanges between the parties consist of fire traded between military units. Only those who breathe the rarefied air of the United Nations headquarters—removed from any vestiges of reality—can come up with the perception of wartime violence as an “extrajudicial killing.” The more one considers the ramifications of the bizarre attempt to bring “judicial killings”—and their antinomy of “extrajudicial killings”—

into the vocabulary of war, the more one is disposed to the conclusion that it belongs in some sci-fi adventure in a faraway galaxy.

Once we return to this planet, with its artillery barrages and airstrikes—causing colossal casualties to enemy combatants only because they are enemy combatants in wartime—it becomes evident that all hostilities are conducted “extrajudicially.” That being the case, if death to enemy combatants can be inflicted “extrajudicially” wholesale, why can it not be done in retail? And if it can be executed by manned military aircraft, why can it not be carried out by military UAVs?

I am not saying that present-day LOAC is perfect or that it should remain static. There are, of course, bones of contention in LOAC: some more profound (I have already referred to the “Great Schism” relating to Additional Protocol I) and others less intense. All these issues have to be addressed, and there are countless fora (formal and informal) in which discussions—sometimes heated—take place about the road and the road bumps to which I have alluded.

The point that I am trying to drive home is that we—as practitioners of LOAC and academics traveling the same road—must do whatever we can to prevent the hostile takeover of LOAC by the human rights-niks. This is quintessential because what the human rights-niks would like to bring about is not merely a shift in emphasis but a regime change: a legal regime change that will revolutionize the field by making hostilities impossible to engage in effectively.

Notwithstanding the existence of powerful non-governmental (NGO) lobbies, which endorse the approach of the human rights-niks, I do not believe that there is any reason for defeatism within our ranks. International law is not created by human rights-niks or by NGOs. It is created by States through treaties and custom. The general practice of States demonstrates that LOAC is alive and well, and that States do not support the attempt to subvert it through the adoption of human rights law tenets.

Some of us in this room (Charlie Dunlap, Charles Garraway, Mike Schmitt, Dale Stephens, Wolff Heintschel von Heinegg and I), as part of a larger Group of Experts under the aegis of HPCR (Program on Humanitarian Policy and Conflict Research at Harvard University), have just finished the preparation of an air and missile warfare manual,¹⁶ which had a NATO launch in Brussels in March 2010. We have toiled for the last six years, in the course of which we have consulted informally (bilaterally, regionally and multilaterally) with dozens of governments. I recommend that you take a look at the resultant document (which, together with a detailed commentary,¹⁷ runs for more than three hundred pages). The manual consists of 175 black-letter rules adopted by consensus. By itself, the consensus is an extraordinary achievement, bearing in mind that it reflected the views of dozens of experts from Canada to China, from Geneva (the International Committee of

the Red Cross) to Washington, DC. But what I want to spotlight is the extensive informal consultations with governments, even in countries (such as Russia) that were not represented in the Group of Experts.

As the commentary on the manual discloses, the consensus on the black-letter rules was not always easy to arrive at, and often a compromise between conflicting views had to be worked out. But let me assure you that the text of the air and missile warfare manual, as adopted, is couched in pure LOAC language. That is exactly what every government consulted wanted. The chatter of the human rights-niks was not heard at any time during the deliberations with those who actually formulate and implement international law.

My advice to this gathering is, therefore, threefold:

- (a) Keep up the good work on the application and interpretation of LOAC.
- (b) Keep poachers off the grass.
- (c) Above all, keep the faith.

Notes

1. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, *reprinted in* THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 711, 737 (Dietrich Schindler & Jiri Toman eds., 4th ed. 2004).

2. *Id.*, art. 51(5)(b).

3. *See* YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 131 (2d ed. 2010).

4. *See* Christopher Greenwood, *Current Issues in the Law of Armed Conflict: Weapons, Targets and International Criminal Liability*, 1 SINGAPORE JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 441, 461–62 (1997).

5. St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, Dec. 11, 1868, 138 Consol. T.S. 297, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 1, at 91, 92.

6. YORAM DINSTEIN, THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION 77–78 (2009).

7. *See id.* at 71–72.

8. For a comprehensive list, *see id.* at 75–77.

9. *See id.* at 81–82.

10. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction arts. I(5), II(9)(d), Jan. 13, 1993, 1974 U.N.T.S. 45, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 1, at 239, 242, 244.

11. *See* WILLIAM BOOTHBY, WEAPONS AND THE LAW OF ARMED CONFLICT 136 (2009).

12. Hague Declaration (IV, 3) Concerning Expanding Bullets, July 29, 1899, 1 AMERICAN JOURNAL OF INTERNATIONAL LAW (Supp.) 157 (1907), *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 1, at 99, 100.

13. *See* DINSTEIN, *supra* note 2, at 25.

14. *See id.* at 23–24.

15. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 240 (July 8); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 177–81 (July 9), *reprinted in* 43 INTERNATIONAL LEGAL MATERIALS 1009, 1038–39 (2004).

16. PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, MANUAL ON INTERNATIONAL LAWS APPLICABLE TO AIR AND MISSILE WARFARE (2009), *available at* <http://ihlresearch.org/amw/HPCR%20Manual.pdf>.

17. PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, COMMENTARY ON THE HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE (2009), *available at* <http://ihlresearch.org/amw/Commentary%20on%20the%20HPCR%20Manual.pdf>.

APPENDIX

CONTRIBUTORS

Contributors

Editors' Note: In order to most accurately portray the events of the conference, the biographical data in this appendix reflect the positions in which the authors were serving at the time of the conference, as set forth in the conference brochures and materials.

Professor Robert M. Chesney is the Charles I. Francis Professor in Law at the University of Texas School of Law, where he teaches courses relating to US national security and constitutional law. Professor Chesney recently served in the Justice Department as an advisor to the Detention Policy Task Force created pursuant to Executive Order 13493, and writes frequently on topics concerning domestic and international laws relating to the capture, detention, trial and disposition of persons in the context of combat and counterterrorism operations. He is a member of the Advisory Committee of the American Bar Association's Standing Committee on Law and National Security, a senior editor for the *Journal of National Security Law & Policy*, an associate member of the Intelligence Science Board, a non-resident senior fellow of the Brookings Institution, a term member of the Council on Foreign Relations and a member of the American Law Institute. His forthcoming scholarship includes a book examining the evolution of military detention practices in Iraq between 2003 and the present and another exploring the evolving role of the judiciary in national security affairs. Professor Chesney also operates a national security law LISTSERV for practitioners, scholars, journalists and students, with approximately nine hundred subscribers from around the world.

Ms. Ashley S. Deeks served as the Assistant Legal Adviser for Political-Military Affairs in the US Department of State's Office of the Legal Adviser until June 2010. In July, she began a position as an Academic Fellow at Columbia Law School. While at the Department of State, she worked on issues related to the law of armed conflict, including detention, conventional weapons and the legal framework for the conflict with al Qaeda. She also provided advice on intelligence issues. In previous positions at the State Department, Ms. Deeks advised on international law enforcement, extradition and diplomatic property questions. From May to December 2005 she served as the Embassy Legal Adviser at the US Embassy in Baghdad, during Iraq's constitutional negotiations. She received several State Department Superior and Meritorious Service Awards. Ms. Deeks was a 2007–8 Council on Foreign Relations (CFR) International Affairs Fellow and a Visiting Fellow in residence at the

Center for Strategic and International Studies. During her fellowship, she explored the different approaches by the United States and European States to armed conflict and the laws of war, as well as issues related to detention, cluster munitions and the use of diplomatic assurances. She also authored a CFR Special Report entitled "Avoiding Transfers to Torture." She has written several articles on the Iraqi constitution, and has served as an adjunct professor at Georgetown Law Center. After graduating from the University of Chicago Law School, she clerked for Judge Edward Becker on the Court of Appeals for the Third Circuit. She is a term member of the Council on Foreign Relations.

Professor Yoram Dinstein is Professor Emeritus of International Law at Tel Aviv University (Israel). He is a former President of the University, as well as former Rector and former Dean of the Faculty of Law. Professor Dinstein served two appointments as the Charles H. Stockton Professor of International Law at the Naval War College. He was also a Humboldt Fellow at the Max Planck Institute for International Law at Heidelberg (Germany), a Meltzer Visiting Professor of International Law at New York University and a Visiting Professor of Law at the University of Toronto. Professor Dinstein is a Member of the Institute of International Law and has written extensively on subjects relating to international law, human rights and the law of armed conflict. He is the founder and Editor of the *Israel Yearbook on Human Rights*. He is the author of *War, Aggression and Self-Defence*, now in its fourth edition (2005), and *The International Law of Belligerent Occupation* (2009). His latest book is *The Conduct of Hostilities under the Law of International Armed Conflict* (2d edition, 2010). Professor Dinstein is frequently cited by the Supreme Court of Israel. He has also been cited by judges of the International Court of Justice, the International Criminal Tribunal for the former Yugoslavia, the House of Lords and the Supreme Court of Canada.

Major General Charles J. Dunlap Jr., US Air Force (Ret.), is a Visiting Professor of the Practice of Law at Duke University Law School and also serves as the Associate Director of its Center on Law, Ethics, and National Security. He is a graduate of St. Joseph's University, Philadelphia, Pennsylvania, and Villanova University Law School. He is also a distinguished graduate of the National War College. General Dunlap served on active duty for more than thirty-four years as an Air Force judge advocate. Immediately prior to retirement, he was serving as Deputy Judge Advocate General, Headquarters US Air Force, Washington, DC. In addition to assignments at various locations in the United States, General Dunlap served in the United Kingdom and Korea, and deployed for various operations in the Middle East and Africa, including short stints in support of Operations Enduring Freedom

and Iraqi Freedom. Totalling more than 120 publications, his writings address a wide range of issues, including the law, airpower, counterinsurgency, cyber power, civil-military relations and leadership. General Dunlap speaks widely on legal and national security issues, and his articles have appeared in a variety of publications ranging from the *Washington Post* to the *Stanford Law Review*.

Professor Charles Garraway CBE retired in 2003 after thirty years in the UK Army Legal Services, initially as a criminal prosecutor and then as an adviser on the law of armed conflict and operational law. In that capacity, he represented the Ministry of Defence at numerous international conferences and was part of UK delegations to the First Review Conference for the 1981 Conventional Weapons Convention, the negotiations on the establishment of an International Criminal Court and the Diplomatic Conference that led to the 1999 Second Protocol to the 1954 Hague Convention on Cultural Property. He was also the senior Army lawyer deployed to the Arabian Gulf during the 1990–91 Gulf conflict. Since retiring, Professor Garraway spent three months in Baghdad working for the Foreign Office on transitional justice issues and six months as a senior research fellow at the British Institute of International and Comparative Law. He was the 2004–5 Charles H. Stockton Professor of International Law at the Naval War College. He is currently a Visiting Professor at King's College London and an Associate Fellow at the Royal Institute of International Affairs (Chatham House) in both its International Law and International Security programs. In 2006, he was elected as a member of the International Humanitarian Fact Finding Commission, established under Article 90 of Additional Protocol I to the Geneva Conventions of 1949. Professor Garraway is a member of the teaching faculty at the International Institute of International Law, San Remo, Italy and has lectured extensively on the law of armed conflict and international criminal justice. He is a widely published author.

Colonel David E. Graham, US Army (Ret.), is the Executive Director of The Judge Advocate General's Legal Center and School, US Army (TJAGLCS). He is a graduate of Texas A&M University (BA), The George Washington University (MA) and the University of Texas School of Law (JD). He is also a Distinguished Graduate of the National War College (1993). Colonel Graham has over thirty years of experience as an Army judge advocate. He has an extensive background in both international and operational law, with a mix of assignments in the United States, Europe, Latin America and the Middle East. During his last eight years on active duty, he served as the Chief of International/Operational Law, Office of The Judge Advocate General, Department of the Army. Mr. Graham has a long-standing relationship with the Legal Center and School, where he served as a professor, a department head and

Academic Director, as well as the Director of the Center for Law and Military Operations. Colonel Graham is a published author in multiple legal and professional journals, and has lectured extensively in both US and international fora on international and operational law topics.

Professor Françoise J. Hampson is Professor of Law, Department of Law and a member of the Human Rights Centre at the University of Essex. Professor Hampson was an independent expert member of the UN Sub-Commission on the Promotion and Protection of Human Rights from 1998 to 2007. She previously taught at the University of Dundee. She has acted as a consultant on humanitarian law to the International Committee of the Red Cross and taught at staff colleges or equivalents in the United Kingdom, United States, Canada and Ghana. She represented Oxfam and Save the Children Fund (United Kingdom) at the Preparatory Committee and first session of the Review Conference for the Certain Conventional Weapons Convention. Professor Hampson has successfully litigated many cases before the European Court of Human Rights in Strasbourg and, in recognition of her contribution to the development of law in this area, was awarded Human Rights Lawyer of the Year jointly with her colleague from the Centre, Professor Kevin Boyle. She has taught, researched and published widely in the fields of armed conflict and international humanitarian law and on the European Convention on Human Rights. She is currently working on international law issues relating to private military/security companies and is a member of the independent panel appointed by the International Court of Justice to examine the conduct of the parties to the conflict in Lebanon in 2006.

Professor Dr. Wolff Heintschel von Heinegg is Professor of Public Law, especially public international law, European law and foreign constitutional law, at the Europa-Universität Viadrina in Frankfurt (Oder), Germany. From October 2004 until October 2008 he was the dean of the law faculty of the Europa-Universität and since October 2008 has served as the university's Vice President. Prior to his association with the Europa-Universität, he served as Professor of Public International Law at the University of Augsburg. In the academic year 2003–4 he was the Charles H. Stockton Professor of International Law at the US Naval War College. He had been a visiting professor at the Universities of Kaliningrad (Russia), Almaty (Kazakhstan), Santiago de Cuba (Cuba) and Nice (France). He was the Rapporteur of the International Law Association Committee on Maritime Neutrality and was the Vice President of the German Society of Military Law and the Law of War. Since 2007 he is a member of the Council of the International Institute of Humanitarian Law in San Remo, Italy. Professor Heintschel von Heinegg was among a

group of international lawyers and naval experts who produced the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, and in 2002 he published the German Navy's Commander's Handbook on the Law of Naval Operations. Professor Heintschel von Heinegg is a member of several groups of experts working on the current state and progressive development of international humanitarian law. He is a widely published author of articles and books on public international law and German constitutional law.

Captain Rob McLaughlin, Royal Australian Navy, is currently Associate Professor of Law at the Australian National University. Previously, he was Director of Operations and International Law in the Department of Defence Legal Division and Director, Naval Legal Service. His previous appointments include as counsel assisting the Chief of Defence Force Commission of Inquiry into the loss of *HMAS Sydney II*, and service as the Strategic Legal Adviser, the Fleet Legal Officer and Executive Officer of *HMAS Wollongong*. He joined the Australian Defence Force (Army Reserve) in 1986 as a rifleman, and was commissioned into the Navy in 1990 as a seaman officer, serving in patrol vessels, landing craft, frigates and destroyer escorts, before subspecializing in submarines. He served as Chief of Maritime Operations for the United Nations Transitional Administration in East Timor Peacekeeping Force in 2001–2, and as the Plans Officer and Legal Officer to the Naval Task Group Commander in Iraq in 2003. He is a graduate of the University of Queensland and holds a master of arts (history) degree from Brown University. Captain McLaughlin obtained his LLB degree at the University of Queensland, an LLM (international law) degree at the Australian National University and M.Phil. (international relations) and PhD degrees at Cambridge University.

Professor John F. Murphy is professor of law at Villanova University School of Law. In addition to teaching, Professor Murphy's career includes a year in India on a Ford Foundation Fellowship; private practice in New York City and Washington, DC; and service in the Office of the Assistant Legal Adviser for United Nations Affairs, US Department of State. He was previously on the law faculty at the University of Kansas and has been a visiting professor at Cornell University and Georgetown University. From 1980 to 1981 Professor Murphy was the Charles H. Stockton Professor of International Law at the Naval War College. He is the author of numerous articles, comments and reviews on international law and relations, as well as the author or editor of various books or monographs. Most recently, he has authored *The Evolving Dimensions of International Law: Hard Choices for the World Community* (2010). His casebook (with Alan C. Swan), *The Regulation of International Business and Economic Relations* (2d edition, 1999), was awarded a certificate of

merit by the American Society of International Law in 1992. Professor Murphy has served as a consultant to the US Departments of State and Justice, the ABA Standing Committee on Law and National Security, and the United Nations Crime Bureau, and has testified before Congress on several occasions.

Lieutenant Colonel Noam Neuman is a senior officer in the Military Advocate General's Corps of the Israel Defense Forces (IDF). During his career, he has served in the International Law Department as the head of the Security and Operational Branch (2004–9). Prior to that assignment, he served in the Office of the Legal Advisor for the Gaza Strip (1994–2003), including as the Deputy Chief Legal Advisor for the final four years. He has specialized in issues relating to international and operational law, and has advised military commanders on the law of armed conflict and the law of occupation. Lieutenant Colonel Neuman is a graduate of the Israel National Defense College and the IDF Command and Staff College. He also holds the degrees of MA (with honors) in political science from Haifa University; LLM from The Judge Advocate General's Legal Center and School, Charlottesville, Virginia; MA (with honors) in philosophy from Bar Ilan University; and LLB, also from Bar Ilan University.

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